SELVI NARAYAN & ANOR (ADMINISTRATORS OF ESTATE OF CHANDRAN PERUMAL; DECEASED)
v. KOPERAL ZAINAL MOHD ALI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
S NANTHA BALAN J
[SUIT NO: 21NCVC-56-09-2015]
9 JANUARY 2017

POLICE: *Duties of police – Breach of statutory duty – Whether police owed duty of care to ensure detainees not harmed – Remand prisoner found dead in cell – Failure to provide medical attention to deceased during period of incarceration – Whether deceased denied of constitutional right – Inquest held to investigate deceased's death found that death of deceased caused by negligence of police – Whether breach of Lock-up Rules 1953 established*

TORT: *Damages – Exemplary damages – Breach of constitutional right by public authority – Remand prisoner found dead in cell – Whether police breached duty of care to deceased – Whether exemplary damages may be awarded – Civil Law Act 1956, s. 8(2) – Case of Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Anor – Applicability*

TORT: *Public misfeasance – Elements to be proven – Public officers exercising powers wrongly resulting in death – Remand prisoner found dead in cell – Whether estate of deceased could claim for exemplary damages*

Chandran Perumal ('the deceased') was detained by the police on suspicion of being involved in the kidnapping/abduction of a newborn baby. The deceased was 47 years old at the time of his death and was working as a driver for a company. According to the plaintiffs, the deceased was earning RM4,500 per month, gave RM3,000 per month to the deceased's wife ('PW1') for household expenses and had six children. The deceased was found dead in his cell on 10 September 2012. A post mortem revealed that the deceased had not eaten any food and had not taken any medication and the cause of death was hypertensive heart disease. The plaintiffs contended that the death of the deceased could have been avoided if he had been promptly sent to the hospital for medical attention and treatment. In the circumstances, it was alleged that the police had breached their common law duty of care and had not complied with their obligations and duties under the Police Act 1967, the Police Regulations 1952 and the Lock-up Rules 1953. In an inquest that was conducted into the deceased's death, the coroner had concluded that the deceased had needlessly died and that the death of the deceased was due to the negligence, omission and dereliction of duties on the part of the police. In the present action, the plaintiffs were claiming, amongst others, for loss of dependency, aggravated and exemplary damages as it was alleged that there was public misfeasance and the conduct of the police was oppressive and an infringement of the deceased's constitutional rights under art. 5(1) of the Federal Constitution. The issues that arose for determination, *inter alia*, were (i) whether the police had a duty of care towards the deceased

whilst he was in custody; and (ii) whether the police were aware that the deceased was in need of medical attention and neglected to take the necessary steps to ensure that he was given medical attention.

Held (allowing plaintiffs' claims):

(1) Both under common law and under statute, there is a duty of care to ensure that the detainee is not harmed by the police or by other detainees or that they do not harm themselves. It is trite that detaining authorities do owe a duty of care to ensure that the detainees/prisoners are healthy and are given proper medical care during the period of incarceration. Further, based on the Lock-up Rules 1953, it is clear that the police have a positive duty to ensure that detainees who are sick are duly attended to. The Lock-up Rules 1953 are a complete code which governs the handling and management of detainees. Detainees would be safe from harm or self harm if the detaining authorities abide by the Lock-up Rules 1953 and ensure that they are fully complied with. Hence, the police do have a duty of care towards those who are under detention during investigations. (paras 127, 128, 129 & 130)

(2) The deceased had died needlessly and his death could have been averted had the police performed their duties and responsibilities. If the police had done their job, they would have observed that there was something not quite right with the deceased and they should have taken steps to intervene and send the deceased to hospital. Everyone who had a duty to look after the detainees as per the Lock-up Rules 1953, had abdicated their responsibilities and washed their hands off the matter. (para 142)

(3) The answer given by those who were in charge of the lock-up that it is normal for detainees to be sleeping all the time was rather too convenient, disingenuous and unacceptable. The deceased was shouting and behaving abnormally and became different. The deceased was in distress and pain and in a crouching position before he permanently slept on his right side, which was the position that his body was found in. Further, it did not appear that any of the patrollers had gone into the cell or even asked the deceased why he had not eaten his food. Had they done so, they might have been alerted to the fact that the deceased was gravely ill. Also, the investigating officer ('DW3') assumed that the deceased was probably pretending to be sick. That was a fatal assumption on DW3's part. In the circumstances, the Lock-up Rules 1953, specifically with respect to the duties of the police to ensure that the detainee is promptly given medical attention and to determine if he was having any mental abnormality were egregiously breached or ignored by the defendants. (paras 143, 145 & 147)

(4) The plaintiffs had succeeded in proving on a balance of probabilities that the defendants had breached their duty of care which was owed to the deceased and that the death of the deceased was due to their negligence in failing to send the deceased to the hospital for treatment in

circumstances where it was apparent that the deceased was not behaving normally and where the police were already informed either directly or indirectly that the deceased was unwell and required medical attention. As such, liability for negligence (by omission) and public misfeasance had been established against the defendants. (para 148)

(5) The deceased was 47 years old at the time of his death and was gainfully employed. There was no argument proffered by the defence to suggest that the deceased was not in good health at the time of his death such that his dependants were disentitled from making a claim for dependency. Despite his medical condition of hypertension, evidence showed that the deceased was able to carry out his tasks as a driver. There was no reason why a claim for dependency should be disallowed on the basis of the pre-existing hypertension of the deceased. As such, the dependents of the deceased were entitled to loss of dependency. (para 150)

(6) Exemplary damages are permissible where public misfeasance and violation of constitutional rights have been established. The death of the deceased in this case was reported to SUHAKAM. That indicated that there is a rule of law, human rights and constitutional dimension to this unfortunate episode. On the facts of the case, the conduct on the part of the police warranted an award of exemplary damages following the case of *Datuk Seri Khalid Abu Bakar & Ors v. N Indra Nallathamby & Anor*, which permitted an award of exemplary damages against a public authority where public misfeasance and violation of constitutional rights had been established. (paras 162, 163 & 166)

Case(s) referred to:

Amin, R (On The Application Of) v. Secretary Of State For The Home Department [2003] UKHL 51 ***(refd)***

Ashley v. Chief Constable of Sussex Police [2008] 2 WLR 975 ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal [2014] 9 CLJ 15 CA ***(foll)***

Howard v. Jarvis [1958] 98 CLR 177 ***(refd)***

Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn. Ghaur Chandram Murugesu & Satu Lagi Rayuan [2016] 3 CLJ 210 CA ***(refd)***

Nurasmira Maulat Abd Jaffar & Ors v. Ketua Polis Negara & Ors [2015] 2 CLJ 231 CA ***(refd)***

Reeves v. Commissioner of Police of the Metropolis [2000] 1 AC 360 ***(refd)***

Legislation referred to:

Civil Law Act 1956, ss. 7(3A), 8(2)
Criminal Procedure Code, s. 117
Federal Constitution, art. 5(1)
Lock-up Rules 1953, rr. 35, 36, 37, 38, 39, 40, 41, 42
Police Act 1967, s. 20(3), (4)
Rules of Court 2012, O. 59 r. 24, O. 91 r. 1(b)

Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 1(1)

Other source(s) referred to:
Halsbury's Laws of England, para 1140

For the plaintiffs - M Visvanathan & Nanda Kumar; M/s Saibullah MV Nathan & Co
For the defendants - Natassa Zaini; SFC

Reported by Sandra Gabriel

JUDGMENT

S Nantha Balan J:

Introduction

[1] This is a tragic case. It arises out of the death of one Chandran a/l Perumal ("the deceased") who was detained by the police on suspicion of being involved in the kidnapping/abduction of a newborn baby. He was 47 years old when he died whilst in police custody. He is survived by his widow and six children. They and the estate of the deceased are the plaintiffs in this action. The plaintiffs allege that the deceased died as a result of the negligence of the police. A post-mortem revealed that the cause of death was hypertensive heart disease. It is not in dispute that the death of the deceased could have been avoided if he had been promptly sent to the hospital for medical attention and treatment. He was found dead in his cell on 10 September 2012. The post-mortem report also revealed that he had not eaten any food and had not taken any medication. An investigation into the death of the deceased was carried out by the fourth witness for the defence, DSP Nasri bin Mansor ("DW4"). The death of the deceased was also reported to the Malaysian Human Rights Commission or Suruhanjaya Hak Asasi Manusia (SUHAKAM).

[2] At the outset, I should point out that this is not an isolated incident of death of a detainee whilst in police custody. In fact, the statistics on police custodial death in Malaysia are rather shocking and troubling, to say the least.

[3] In a report compiled by SUHAKAM, it was stated that between 2000-2014 (15 years) there were 255 deaths involving detainees who died whilst in police custody. This means that on average there were 17 deaths per year involving detainees who died whilst in police custody. By extension, it also means that there was more than one death a month for the 15 years period between 2000-2014. Quite apart from the immediate loss, misery and suffering of the families of the deceased, the other important public interest or human rights dimension is that these deaths may be a manifestation of the slow process of abnegation of the rule of law. There is of course, no acceptable minimum for custodial deaths and one death of a detainee in police custody is one death too many. Indeed, in a modern, matured and evolved constitutional democracy such as obtains in Malaysia, it is axiomatic and imperative that there should be zero deaths of detainees in police

custody. And more importantly, there should be zero tolerance by all concerned, of deaths of detainees in police custody. With those sobering and morbid observations, I turn now to the tragedy that unfolded.

[4] The starting point in this human tragedy is the arrest of the deceased on 6 September 2012. The deceased (together with three others) was arrested by the police on suspicion of being involved in the kidnapping/abduction of a newborn baby from the Hospital Universiti Kebangsaan Malaysia ("HUKM"). The baby was born on 4 September 2012.

[5] Eventually, none of the suspects who survived their detention by the police, was charged for the offence of kidnapping/abduction. The narrative of events will show that the purported father of the baby, one Alaudin (a Bangladeshi citizen), was desperate for funds to pay his wife's medical bills at HUKM. In the police report, the baby's mother described Alaudin as a "friend" who was trying to help her pay the medical bills at HUKM. But it is more likely that the description of "friend" in her police report is a euphemism for "husband". Apparently, Alaudin was looking for someone to settle the medical bills and adopt the baby. According to the version that was given at the coroner's inquest by Navintharan (one of the co-detainees) (who has since died), Alaudin was prepared to give up the baby so long as the maternity bill at HUKM was settled. Of course, this was plainly an illegal or illicit transaction or arrangement concerning the "adoption" of a baby and would have given rise to child trafficking or other offences, but it is doubtful whether it amounts to an offence of kidnapping/abduction under the Penal Code.

[6] It must be emphasised however, that this case is not about whether an offence of kidnapping/abduction had been committed. Rather, the issue here is the manner in which detainees were or should be treated and cared for whilst they are in police custody and the responsibility for the health of those in detention, particularly those who have pre-existing medical conditions or those who present medical emergencies.

[7] To continue with the narrative, when the deceased received information that there was a baby available for adoption, he informed his relative, Rahiman bin Abdul Rashid ("PW7"). PW7 was married to Siti Rohani binti Abdullah ("Siti") who is a Muslim convert. She is the sister of the deceased's wife ("P1")("PW1"). PW7 and Siti had been married for ten years and were without children. Both of them suffered from kidney disease and were taking oral medication and undergoing dialysis treatment three times a week. They wanted to adopt the baby. They paid an agreed sum of money to Alaudin and took the baby from HUKM. Navintharan was the intermediary to this transaction.

[8] As far as the couple were concerned, it was a consensual arrangement. But the matter quickly got out of hand as the mother of the baby lodged a police report stating that her baby was kidnapped from HUKM (see: police report dated 6 September 2012 by Ita Septyanita) (pp. 200-201, B3). Her

police report prompted the police to swing into action. The deceased together with PW7, Siti and a co-worker of the deceased (Navintharan) were promptly arrested by late afternoon/evening on 6 September 2012. As I said earlier, PW7 and his wife (Siti) suffered from kidney disease and required dialysis three times a week. The police were duly informed of their medical condition. However, during the period of their detention, they were not taken to the hospital for dialysis or for any form of treatment. As for Navintharan, he died after giving evidence before the coroner.

[9] PW7 gave evidence before the coroner. He also testified in the trial before me. But I was informed by counsel for the plaintiffs during oral submissions that PW7 had passed away after he gave evidence in the trial. I should also add that the fourth defendant, Insp. Mohd Saidon bin Shaari ("D4") had passed away before the coroner's inquest. As such, neither the coroner nor this court had the benefit of D4's evidence. D4's evidence would have been crucial as he was the officer in charge of the lock-up at the Ibu Pejabat Daerah Dang Wangi ("IPD Dang Wangi") located along Jalan Dang Wangi, Kuala Lumpur. D4 was also in charge of all the officers who did the patrol rounds in the lock-up area. According to plaintiffs' counsel, IPD Dang Wangi was a brand new building and was officially opened in 2011. The death of the deceased occurred slightly more than a year after the building was officially opened.

[10] I turn now to the claim. This is a claim by the widow and dependents and the estate of the deceased, who died of "hypertensive heart disease" whilst in the custody of the Polis DiRaja Malaysia ("the police") at its lock-up in IPD Dang Wangi. The claim is for special damages, bereavement, loss of dependency, general and aggravated/exemplary damages.

[11] The legal issue in this case is whether the police had a duty of care towards the deceased whilst he was in custody and whether that duty, if it exists, encompasses an obligation to ensure that the deceased is given proper medical care and attention. A key factual issue here is whether the police were aware or made aware that the deceased was on medication for hypertension and whether the deceased had presented any overt symptoms which warranted medical attention.

[12] In this context, it is also necessary to ask whether the police turned a blind eye and were oblivious to the medical needs of the deceased. Ultimately, the issue is whether the police were aware that the deceased was in need of medical attention and neglected to take the necessary steps to ensure that he is given medical attention. I turn now to the background facts.

Backgrounds Facts

[13] The plaintiffs are the lawful administrators of the estate of the deceased ("the estate"). The first plaintiff (PW1) and the second plaintiff (PW2) are the wife and the eldest daughter of the deceased respectively. The

plaintiffs' claim is for the loss suffered by the estate and for the loss suffered by the lawful dependents arising out of the death of the deceased on 10 September 2012.

[14] According to the plaintiffs, the death of the deceased was caused by the negligence of the defendants. It is also alleged that the conduct of the defendants amounts to public misfeasance and a breach of the deceased's constitutional rights.

[15] Insofar as the time of death is concerned, there is some controversy as to whether the deceased died in the morning or at night on 10 September 2012. According to Tuan Ahmad bin Bache (now Judicial Commissioner) ("the coroner") who conducted the inquest into the death of the deceased (Inquest No. 65A-02-04-2014), the deceased died at 7.48am on 10 September 2012. There were some injuries on the body of the deceased and this raised the suspicion that the deceased may have been assaulted whilst in police custody. Despite this finding, DW4 insisted that the deceased died at night on 10 September 2012.

[16] The verdict by the coroner's inquest was delivered on 16 January 2015. The coroner ruled that the death of the deceased was as a result of negligence of the police. In this regard, the coroner handed down the following verdict:

(1) Bila simati mati?

Mahkamah berpuas hati, walaupun ada beberapa Versi yang dikemukakan, simati telah meninggal dunia pada atau sebelum 7.48 pagi pada 10 September 2012.

(2) Dimana simati mati?

Adalah tidak dipertikaikan simati telah meninggal dunia di Lokap IPD, Dang Wangi, Kuala Lumpur

(3) Bagaimana simati mati?

"Hypertensive heart disease" ekoran dari tekanan darah menjadi tinggi.

(4) Simati mati didalam apa cara?

Kerana tidak diberikan dan tidak memakan ubat-ubatan berkaitan dengan penyakit ini.

(5) Ada sesiapa yang terlibat secara jenayah di dalam menyebabkan kematiannya?

Pegawai dan anggota polis dari IPD Cheras dan Dang Wangi kerana telah melakukan pengabaian salah (unlawful omission) sehingga menyebabkan kematian simati dengan cara tidak memberikan ubat-ubatan simati untuk penyakitnya dan tidak membuat tindakan-tindakan sewajarnya sedangkan keadaan kesihatan mendesak simati dalam tempoh yang dimaksudkan adalah ketara yang mewajarkan beliau dihantar dan dirawat segera di hospital.

(pp. 197-198 Bundle B1)

[17] As for the injuries that were found on the body of the deceased, the coroner concluded as follows:

> Saksi pakar ini menganggarkan bahawa kecederaan-kecederaan ini berlaku di dalam masa kurang seminggu atau pun lebih kurang 5 hari sebelum kematian simati. Saksi SI 4 serta SI 5 yang tinggal bersama simati telah menjelaskan bahawa mereka tidak melihat apa-apa kecederaan kepada simati sebelum ditahan polis.
>
> Ini bermakna besar kemungkinan simati mengalami kecederaan ini semasa dalam tahanan. Persoalannya adakah kecederaan tersebut adalah akibat dari simati dipukul kerana meracau, merapu atau pun menjerit di dalam lokap?
>
> Keduanya jika betul simati dipukul, adakah dia dipukul oleh anggota polis ataupun dipukul oleh rakan tahanannya kerana meracau, dan menjerit-jerit? Atau adakah kecederaan ini akibat tindakan simati mencederakan dirinya sendiri? Tiada keterangan untuk mahkamah membuat penentuan mengenai perkara ini. Apa yang nyata adalah simati tidak akan mengalami kecederaan-kecederaan ini sekiranya tidak berada di dalam tahanan pihak polis. Adalah menjadi tanggungjawab pihak polis untuk memastikan bahawa mana-mana tahanan tidak dicederakan oleh mereka atau oleh tahanan lain (cellmates) atau tahanan itu mencederakan dirinya sendiri.

(pp. 194-195 Bundle B1)

[18] Next, as for the honesty of the police (or their lack of it) and/or their lack of humanitarian values, the coroner made the following observations:

> Pihak polis juga telah membuat laporan polis (Dang Wangi Report 035719/12) EI 31 bahawa simati telah dijumpai mati pada jam lebih kurang 1900 (7 petang) pada 10 September 2012 walaupun gambar CCTV telah menunjukkan bahawa simati telah dijumpai tidak bergerak pada jam 7.48 pagi pada tarikh tersebut. Sila rujuk kepada gambar-gambar CCTV (EI-17) yang jelas menunjukkan kehadiran seorang anggota polis di depan lokap dimana simati ditahan pada pukul 7.48 pagi lagi (Gambar di mukasurat 11 dan 12). Fakta ini juga telah diakui saksi inkues (SI 6). Kedudukan simati digambar EI 16 (no. 6 dan 7) yang diambil pada pukul 10 malam hari kejadian di dalam lokap tersebut oleh SI 8 adalah sama. Ini menunjukkan simati telah meninggal dunia seawal pukul 7.48 pagi lagi. Ini menunjukkan pihak polis telah tidak membuat laporan secara tepat dan jujur dan tidak mengikut keperluan undang-undang.
>
> Mahkamah berpendapat keseluruhan keterangan menunjukkan kecuaian, kegagalan dan keabaian pihak polis untuk memberi apa-apa jenis bantuan khususnya bantuan keperluan ubatan yang mendesak kepada simati sebelum kematian beliau sedangkan mereka mengetahui pengenai perkara ini atau setidak-tidaknya mereka sedar keadaan simati dalam tempoh tersebut menunjukkan simati memerlukan "immediate medical attention".
>
> Sewajarnya tempoh yang dimaksudkan tidak terdapat apa bentuk sifat perikemanusiaan yang ditunjukkan oleh pihak polis, samada dari IPD Cheras mahupun dari Lokap Dang Wangi, terhadap simati. Malahan lagi

simati telah diketahui mati seawal pagi lagi pada pukul 7.48 tetapi dibiarkan dan dilaporkan di sebelah petang pada pukul 7.00 petang. Tidakkah mereka masuk memberi makan pada tengah hari dan petang pada hari tersebut.

Mahkamah juga berpendapat jika pemantauan yang lebih baik telah diadakan bukan sahaja oleh anggota "Patroller" serta anggota di bilik CCTV maka nyawa simati mungkin telah dapat diselamatkan. Anggota polis yang datang memberikan keterangan di Mahkamah juga tidak dapat mengesahkan samada simati telah makan seperti orang normal semasa berada di dalam lokap. Perkara ini mudah disahkan memandangkan simati telah dimasukkan ke dalam lokap berseorangan pada masa itu.

(pp.195-196 Bundle B1)

[19] The deceased was 47 years old at the time of his death and was working as a driver for a company known LM Partners Sdn Bhd. According to the plaintiffs' pleaded case, the deceased was earning RM4,500 per month and gave RM3,000 per month to PW1 for household expenses.

[20] One Zulizan Mohd Ronzan ("PW4") who worked as a human resource executive at LM Partners Sdn Bhd testified as to the income of the deceased. I have no reason to doubt the evidence that was given by PW4. No doubt, the deceased was not earning a fixed income and his income fluctuated from month to month. But according to PW1, she used to receive RM3,000 from the deceased every month for household expenses and upkeep of the family.

[21] The deceased had six children. They are:

Name	Age	Status
Rita	23 years old	Security guard in KLIA
Kavithra	22 years old	Sales Assistant in Mitsui Shop KLIA2
Darjini	20 years old	Civil Engineering's student of Polytechnic of Port Dickson
Suria Kirthni	13 years old	Form 1 student of SMK Sg Pelek
Rishanthini	12 years old	Standard 6 student of SJKT Sepang
Monisha	9 years old	Standard 3 student of SK Sg Pelek

The Arrest On (Thursday) 6 September 2012

[22] The deceased was arrested by the police on 6 September 2012 together with three other persons as they were all suspected of being involved in an alleged kidnapping of a baby who was born to an illegal Indonesian woman by the name of Ita Septyanita ("Ita"). The arresting team was from Ibu Pejabat Daerah Polis Cheras, Kuala Lumpur ("IPD Cheras").

[23] The investigating officer for the case was Insp Mahezal b Md Noh (the third defendant and the third witness for the defence - "DW3"). DW3 was investigating the suspects for an offence of kidnapping/abduction under

A the Penal Code. It is the plaintiffs' contention that the baby was actually voluntarily handed over to PW7 and Siti. I shall refer to both of them collectively as "the couple".

[24] The third suspect, N Navintharan a/l Narasiaman ("Navintharan") was a co-worker of the deceased and had introduced the couple to Ita for
B purposes of adoption of the baby. The couple had been married for ten years and were childless. They had agreed to adopt the baby. The baby was handed back to Ita on the day of the arrest on 6 September 2012 and was never seen again.

C **[25]** The deceased had no previous convictions or any past history of criminal activity. The family of the deceased claim that they had been denied the right to meet or see the deceased at any point after his arrest.

[26] This was so despite repeated requests and demands made. One aspect of the complaint by the plaintiffs is that the medicines that the deceased had
D to take on a daily basis could not be given to the deceased.

[27] Lastly, it is alleged that the police were aware that the deceased was in need of medical treatment and they failed to take the necessary steps to ensure that the deceased received medical treatment. It is alleged that the police had breached their common law duty of care and had not complied
E with their obligations and duties under s. 20(3), (4) of the Police Act 1967, the Police Regulations 1952 (namely regs. 13, 38, 39, 41, 45, 46, 47, 52 and 60) and the Lock-up Rules 1953 (namely rr. 35 to 42).

The Remand

F **[28]** After the arrest of the deceased on 6 September 2012, he was taken to IPD Cheras. But there was no lock-up facility at IPD Cheras. As such, the deceased and the other suspects were taken to IPD Dang Wangi. According to DW3, the deceased was held at IPD Cheras for about half an hour. Thereafter, they were all taken to and registered at IPD Dang Wangi by
G Koperal Pilot Lanye (second defendant) ("DW1"). In his witness statement (DW1A), he said that the detainees did not complain of any health problems and he was satisfied that they did not have any injuries on them. It was obvious from DW1's testimony that he was merely in charge of registration of detainees upon their arrival at IPD Dang Wangi and he did not know what happened to the detainees or what took place in the lock-up cells. For
H instance, DW1 said that he did not hear the deceased shouting or ranting which can only mean that he did not know what transpired within the cell block of IPD Dang Wangi.

[29] DW3 made two remand applications before the Magistrate under s. 117 of the Criminal Procedure Code. The remand orders are dated
I 7 September 2012 (Friday) and 9 September 2012 (Sunday). The total period of remand that was allowed was from the 7 to 12 September 2012. The remand process was done at IPD Dang Wangi on both occasions. DW3 was present during both the remand applications.

[30] However, insofar as the deceased is concerned, events overtook the second remand order as he died on Monday, 10 September 2012.

[31] The plaintiffs allege that despite knowing that the deceased was in poor health, the police had sent him to the lock-up without giving him any medical aid nor making any arrangement for medical attention to be provided. The deceased was alone in the lock-up and he was found dead in a lying position on the cement floor.

[32] Before his death, the deceased was apparently behaving abnormally and so he was placed in a cell alone. According to the plaintiffs, the cell (marked as cell "I") had no toilet or any proper place to sleep on. The deceased had to sleep on a cement floor. He subsequently died in the early hours of 10 September 2012. The estimated time of death was 7.48am on 10 September 2012 (as per the coroner's verdict).

[33] Nurhashimah binti Abd Rahman ("PW5") a lawyer from the Yayasan Bantuan Guaman Kebangsaan ("YBGK") (National Legal Aid Foundation) confirmed that during the remand application on Sunday, 9 September 2012, she represented the suspects. PW5 said that she was informed by PW7 and Navintharan that the deceased was unwell. She said that during the remand, the deceased was lying on the floor and did not speak. He was, to use her words, "tidak bermaya". PW5 informed the remand Magistrate that the deceased was unwell and should be given immediate medical aid. However, despite a directive by the remand Magistrate, the police took no steps to send the deceased to the hospital for medical attention.

[34] The post-mortem on the deceased was done by the forensic pathologist, Dr Nurul Kharmila binti Abdullah ("PW3") of Hospital Kuala Lumpur ("HKL"). She concluded that the deceased had died of "hypertensive heart disease".

[35] According to PW3, the deceased had died needlessly as the death could have been prevented with proper medications. There were also injuries found on the body of the deceased. PW3 said that the stomach of the deceased was empty and there was no evidence of ingestion of any medication. As for the injuries, PW3 said that they were likely to have been caused by blunt force trauma. She opined that the injuries may have been inflicted upon the deceased or may have been self-inflicted.

[36] She elaborated that the deceased had an enlarged heart and that due to the stress of the incarceration and lack of medication, his blood pressure may have shot up and this may have led to a massive heart attack, which was fatal to the deceased.

[37] In the inquest that was conducted into the deceased's death, the coroner had concluded that the deceased had needlessly died and that the death of the deceased was due to the negligence, omission and dereliction of duties on the part of the police.

[38] The plaintiffs are therefore claiming for special damages (funeral expenses), loss of dependency and for the loss suffered by the estate as per ss. 7 and 8 of the Civil Law Act 1956. The first plaintiff, as the spouse of the deceased also claims for bereavement under s. 7(3A) Civil Law Act 1956. The plaintiffs, on behalf of the estate, are also claiming aggravated and exemplary damages as it is alleged that there was public misfeasance and the conduct of the police was oppressive and an infringement of the deceased's constitutional rights under art. 5(1) of the Federal Constitution.

The Defence

[39] I shall summarise the defence. According to the defence, the arresting team from IPD Cheras had apprehended the deceased based on a police report made by Ita.

[40] There was reasonable suspicion based on Ita's police report and information received, to arrest the deceased for the offence of kidnapping. The deceased was informed of the reasons for the arrests. Acting on information, on 6 September 2012 at about 3.15pm, a team led by Inspector Lew Keng Joe had apprehended the deceased. The arrest was made at a construction site in front of a building known as OUG Hill Condominium.

[41] On the same day at about 3.45pm, the deceased took the police team to the side of the road off the Puchong Highway - Bukit Jalil Kuala Lumpur facing the Kinrara Industrial Park where they arrested Navintharan. On the same day at about 5.15pm, the deceased led the team to No. 28, Jalan Lapis 3, Taman Sinar Terang, 43950 Sungai Pelek, Selangor to arrest PW7 and Siti. The team also found a baby boy who was (allegedly) abducted from Ita along with documents belonging to the birth of the baby boy.

[42] The first defendant (DW2) and the second defendant (DW1) take the position that they had complied with the Lock-up Rules 1953 and that they are not responsible for supervising and/or monitoring CCTV monitors. The defendants maintain that the arrest and detention of the deceased was known to the deceased's family. DW3 said that there were many family members who had gathered at IPD Cheras on 6 September 2012 and he only dealt with someone called Loga. He said he gave Loga his contact number and informed him that there would be a remand application the next day, 7 September 2012.

[43] He said Loga did not inform him that the deceased was suffering from high blood pressure and needed to take medication. According to DW3, he had asked all the suspects (including the deceased) whether they had any health problems. He said only PW7 and Siti said that they had kidney problems and were on dialysis/medication. He said the deceased did not mention anything about health problems. I note with some significance that this evidence was not part of DW3's narrative before the coroner.

[44] DW3 said that he made notes in his investigation diary ("ID"), but did not produce the ID for inspection during the trial. DW3 said that the deceased did not complain about his health and was co-operative when he gave his cautioned statement during the investigations. DW1 and DW2 also said that the deceased never complained about his health. According to the defence, a physical examination of the deceased during the arrest, during the process of admission to the lock-up and while in the lock-up, showed that the deceased was in good health. They concluded that the deceased was healthy and did not need medical treatment because he could walk unaided and did not make any complaints about his health.

[45] Further, the deceased did not personally make any complaints about his health during the proceedings at the remand on 9 September 2012.

[46] The defendants stated that all reasonable steps had been taken to ensure the safety of the deceased while in the police lock-up (see: para. 11(a) to (e) and paras. 29(a) to (d) of the defence dated 3 November 2015).

[47] It is significant that the defendants had also made the following assertions in the defence in terms of their alleged compliance with, *inter alia*, the Lock-up Rules 1953:

> 30. Perenggan 17(o) Pernyataan Tuntutan dinafikan. Defendan-defendan menyatakan bahawa semua langkah munasabah telah diambil untuk memastikan keselamatan Si mati semasa berada di dalam lokap Balai Polis tersebut.
>
> 31. Perenggan 17(p) Pernyataan Tuntutan dinafikan. Defendan-**defendan akan mengemukakan keterangan semasa perbicaraan kelak yang menunjukkan bahawa Kaedah-Kaedah Lokap 1953 telah dipatuhi sepenuhnya** dan Defendan-defendan tidak melakukan sebarang kecuaian dan/atau kemungkinan kewajipan berkenaan pengurusan operasi dan pemantauan keseluruhan Balai Polis tersebut.
>
> (emphasis added)

Issues To Be Tried

[48] The first issue is whether the defendants owed a duty of care towards the deceased who was under remand and in the custody of the defendants at the material time when the deceased died of hypertensive heart disease.

[49] The second issue is, if they owed a duty of care, whether the defendants had breached that duty in failing to provide all reasonable and necessary medical attention to the deceased whilst under remand at IPD Dang Wangi.

A **The Witnesses**

Plaintiffs		Defendants	
Selvi d/o Narayan (P1)	PW1	Koperal Pilot Lanye (D2)	DW1
Rita d/o Chandran (P2)	PW2	Koperal Zainal Bin Mohd Ali (D1)	DW2
Dr Nurul Kharmila Binti Abdullah	PW3	Ins Mahezal B Md Noh (D3)	DW3
Zulizan Mohd Ronzan	PW4	DSP Nasri Bin Mansor	DW4
Nurhashimah Abd Rahmah	PW5	-	-
Palany s/o Motayan	PW6	-	-
Rahiman Bin Abdul Rashid	PW7	-	-

B

C

The Evidence

D

[50] I will start with PW1's evidence. According to PW1, between 6 September and 9 September 2012 she, her sister, her brother in law and her late husband's friend, Palany ("PW6") had attempted to see the deceased who was in police custody but were unable to do so. She was worried about her husband's health as he needed to take medication for high blood pressure. She was not too sure of the dates in question.

E

[51] She said that when she went to the IPD Cheras on one of the days when her husband was in detention, a police officer demanded RM300 from her, which she paid in exchange for information about her husband (see p. 190 B1 and p. 203 B3). But she said that despite making payment, she never got any information about her husband.

F

[52] Essentially, her evidence was that no one at IPD Cheras entertained her request to see her husband. Of course, by midnight on 6 September 2012, the deceased was already transported to IPD Dang Wangi, but it does not appear that PW1 was aware of this development. According to PW1, on 10 September 2012 at around 10pm she received a call from the police. She said the police asked whether her husband had suffered from any medical condition and she told them that he had high blood pressure and was on medication. She said this was the first time that the police had asked about the deceased health. They then informed her that her husband had died in the lock-up.

G

H

[53] Of course, PW1 had no personal knowledge as to what actually took place whilst the deceased was in police custody at IPD Dang Wangi. PW1 relied entirely on the notes of proceedings of the coroner's inquest and the verdict/findings by the coroner to bolster her claim against the defendants. She also relied on the evidence of PW5 and PW7 in relation to the knowledge of the police as regard the medical condition of the deceased.

I

[54] She also referred to Navintharan's evidence that was given at the coroner's inquest as regard to what happened in the lock-up. Her evidence was as follows:

> Adakah kamu tahu apa yang berlaku kepada suami kamu ketika beliau berada di dalam tahanan polis?
>
> Pada masa tersebut, saya sebenarnya tidak mengetahui secara peribadi apa yang telah berlaku kepada suami saya semasa dalam tahanan.
>
> Hampir keseluruhan daripada pengetahuan saya kini adalah berdasarkan perkara - perkara yang telah dinyatakan di dalam inkues bagi menyiasat kematian suami saya.
>
> Ketika inkues tersebut, salah seorang rakan sekerja suami saya yang bernama N. Navintharan a/l Narasima telah memberikan keterangan bahawa beliau tahu suami saya menghidap penyakit darah tinggi dan pernah melihat suami saya memakan ubat. (Sila rujuk Ikatan Dokumen (Part A-1) page 12). Saya difahamkan N. Navintharan a/l Narasima juga telah kini meninggal dunia.
>
> Peguamcara saya telah menunjukkan dan menerangkan keterangan Navintharan ketika inkues tersebut. (Ikatan Dokumen (Part A-1) pages 12, 13, 14, 15, 16, 17, 18, 19, 20) Terdapat perubahan kelakuan suami saya yang sangat jelas dan ketara. Suami saya telah meracau dan membuat kecoh.
>
> Mengikut Navintharan serta lain - lain saksi di dalam inkues tersebut, suami saya kemudiannya telah diasingkan dan ditempatkan di dalam lokap seorang diri. Suami saya dikatakan telah membuat kecoh dan menjerit di dalam lokap seorang diri. Navintharan telah memaklumkan kepada pihak polis bahawa suami saya memerlukan bantuan perubatan tetapi tidak diendahkan.
>
> Badan suami saya mempunyai luka di dahi kanan dan juga lebam di rusuk kiri antara lain. Gunalan juga telah melakukan laporan polis berkenaan hal ini (Sila rujuk Ikatan Dokumen (Part B) M/S 202). Saya tidak tahu bagaimana suami saya boleh mengalami kecederaan sedemikian kerana beliau berada di bawah tanggungjawab dan pengawasan pihak polis pada masa itu.
>
> Adakah kamu tahu keadaan lokap di mana suami kamu diasingkan?
>
> Gambar - gambar lokap telah dikemukakan di dalam prosiding inkues tersebut. Ikatan Dokumen (Part B) M/S 244-249. Saya pohon agar saya tidak diarahkan untuk melihat melihat gambar - gambar lokap tersebut.
>
> Saya telah difahamkan bahawa tiada sebarang alas papan untuk tidur dan tiada sebarang tandas di dalam lokap tersebut. Suami saya terbaring di lantai simen yang sejuk.
>
> Saya juga difahamkan bahawa Tuan Ahmed Bin Bache telah memutuskan bahawa penempatan suami saya di dalam lokap tersebut adalah tidak berperikemanusiaan lebih - lebih lagi apabila ianya jelas bahawa suami saya memerlukan bantuan perubatan dengan serta - merta pada ketika itu. (Sila Rujuk Ikatan Dokumen (Part A) M/S 193).

A Ada apa - apa lain yang kamu tahu berkenaan dengan keadaan suami kamu ketika beliau berada di dalam lokap?

Di dalam prosiding inkues saya amat sedih mengenangkan nasib suami saya yang langsung tidak makan atau minum semasa berada di dalam tahanan polis. Doktor bedah siasat juga telah mengesahkan bahawa perut
B suami saya sememangnya kosong semasa bedah siasat dilakukan.

Tiada sebarang langkah di ambil oleh polis untuk memberikan bantuan perubatan kepada suami saya atau membawa suami saya ke hospital sedangkan ianya begitu jelas bahawa sesuatu yang serius sedang berlaku kepada suami saya pada ketika itu.

C **[55]** The plaintiffs' case is that the police were aware that the deceased was in need of medical attention and failed to send him to the hospital for medical assessment and treatment. In this regard, it is imperative to note that on 15 October 2012, Navintharan lodged a report (p. 201, B3) where he said,

Tarikh: 15/10/2012

D

...

Pada 9hb Oktober 2012 saya telah merayu kepada Magistrate untuk membenarkan En. Chandran A/L Perumal dibenarkan untuk mendapatkan rawatan kerana keadaannya yang semakin uzur. Seterusnya, Tuan Magistrate telah mengarahkan pihak polis untuk
E membawa En. Chandran a/l Perumal ke hospital. Akan pihak polis tidak mengambil sebarang tindakan membawa En. Chandran a/l Perumal ke hospital mahupun memberi air minuman serta ubatan. Sebaliknya pihak polis telah mengasingkan En. Chandran a/l Perumal daripada kami. Saya yang ditempatkan dilokap berasingan dapat merasai jeritan kesakitan
F En. Chandran a/l Perumal sehingga tidak dapat tidur ...

[56] Of course, the date of the remand that was stated in Navintharan's police report (9 October 2012) is erroneous as the remand proceeding was conducted on 9 September 2012 and the deceased was found dead on 10 September 2012.

G **[57]** PW1 also testified as regard the loss of dependency. Here, I noted that she was not seriously challenged as to the amount that PW1 said was given to her by the deceased every month. Taking it at its highest, what was established in cross-examination is that the income of the deceased fluctuated. But that in itself cannot mean that the deceased never gave any
H money to his wife on a monthly basis. At any rate, in the ultimate analysis, I find that PW1 was credible in terms of her evidence on loss of dependency. It is important to note that PW1 was a housewife and the deceased was the sole breadwinner of her family.

[58] After her husband's death, she was left to look after her family
I comprising of four school-going children. The sum of RM3,000 which she said was given to her by the deceased every month was by no means an exaggerated amount. It is a reasonable sum taking into account the size and needs of PW1's family. Also, I find that in terms of the funeral expenses,

there was hardly any challenge to the amounts that were incurred for these expenses. But, in terms of strict proof, it appears that the plaintiffs only presented a bill for RM3,000 (p. 264 B4) which was issued by the company which provided funeral services.

[59] DW3 maintained that the family of the deceased had his contact number and that they could have called him to say that the deceased needed medication. He said no one told him that the deceased had hypertension and was on medication.

[60] As for contact with the police on information concerning the deceased, PW1 said that no one gave her DW3's phone number. She said that she went to the police station on 9 September 2012 and also on 10 September 2012. PW1 stated that she does not remember the name of the investigating officer ("IO"). PW1 stated that she was not aware of the remand application on 7 September 2012. During cross-examination, it was put to her that the IO's contact number was given to PW1's family member.

[61] PW1 stated that her family member did not mention it. It was put to her that the IO had given his contact number to PW1 and her family but it was not utilised. PW1 answered that she does not know about this and they may have given it to someone called Gunalan.

[62] It was also put to PW1 that she or her family members did not give the medicine to the IO when the deceased was detained. PW1 stated that she brought the medicine on 9 September 2012. She said that she enquired from a police officer about the case but no one entertained her questions.

[63] PW1 said that on 10 September 2012, she went to the police station again and met a police officer. The police officer asked for her husband's name and PW1 gave her husband's name to the the police officer. The policeman asked her whether this was a kidnapping case. PW1 then said she has six daughters and the policeman said yes he knows. PW1 then informed the officer that the deceased has health issues and she needs to give him medicine. The police officer apparently said that they have medicines. PW1 then said the deceased has a serious disease and that without medicines it will become a problem. PW1 stated that this happened on 10 September 2012. In cross-examination, it was put to PW1 that the first time that she told the police that the deceased was very sick and he needs to take medicine was on 10 September 2012.

[64] PW1 answered that those who were arrested with the deceased also informed the police that the deceased is sick and needs to take his medicine daily.

[65] I turn now to PW2's evidence. PW2 is PW1's daughter. She explained that the dependents of the deceased are PW1, PW2 and her five sisters. (B1 pp. 5-10). At that material time, PW2 was pursuing a certificate in information technology ("IT") at Simpang Renggam while working part-

time. PW2's first sister was looking for a job while the second, third and fourth sisters were schooling in secondary school, primary 2 and primary 3 respectively. PW2's last sister was less than five years old.

[66] Next, we may refer to PW3's evidence. She was the pathologist on duty at HKL on 11 September 2012. She carried out the post-mortem on the deceased's body at 12:45pm. (see: B1 pp. 17-22; B3 pp. 240-263; B1 p. 4). PW3 also testified before the coroner during the inquest proceedings. She confirmed that the deceased was a hypertensive patient for quite some time and that he had never experienced any heart attack prior to this.

[67] According to PW3, not taking medication for that period of time and without medical attention or assistance for a person with such a pathological condition is a recipe for disaster.

[68] PW3 confirmed that the deceased had not consumed any food and there was also no evidence of medication in his bloodstream. She concluded that the cause of death is hypertensive heart disease as evidenced by all pathological changes.

[69] She confirmed that a patient with the deceased's condition at that material time could be stabilised with medication if the patient was taken to the hospital in a timely manner. She opined that the deceased would have already been in distress because he was in a lock-up. The lock-up conditions where an inmate is kept alone in a lock-up would further contribute to stress. She said hypertension, stomach ulcers, perforated ulcers could also be stress induced. As for injuries on the deceased, she found a subgaleal hematoma measuring 10cm by 12cm on the right frontal area of the skull. PW3 said that this was caused by blunt force, but she could not say whether it was inflicted by someone else or self-inflicted. She opined that this is not a serious hematoma.

[70] However, she also clarified that these injuries would have caused pain but pain is subjective depending on threshold and how the particular individual reacts to the pain. There were about seven lesions on the deceased's forearm up till his elbow. They could look like burn marks but they are possibly caused by scratchings as well. There were healing lacerations on the anterior aspect of the left forearm and healing abrasions on the right elbow.

[71] Further, there were healing small abrasions on the right shin and subcutaneous bruise on the lateral aspect of the right leg. During cross-examination, PW3 was asked if the deceased's medical condition was serious and she answered that it was serious and that is why he died. She said skipping medications for even one or two days can cause the blood pressure to shoot up and with the deceased's pathological condition, it is serious.

[72] I turn now to the evidence of PW5 (Nurhashimah Abd Rahman). At the material time, she was a lawyer registered with YBGK. PW5 represented the deceased, PW7, Navintharan and Siti during the remand

hearing on Sunday, 9 September 2012. The hearing was conducted at IPD Dang Wangi. PW5 had previously testified in the inquest before the coroner.

[73] PW5 said that she remembered this case quite well because it involved an alleged offence of kidnapping of an infant whereas the remand hearings are usually for drug offences or theft cases. PW5 said she interviewed PW7, Navintharan and Siti. The minutes of the interview are recorded in a YBGK interview sheet which has two pages. (B3 pp. 208-211; B4 p. 277). The particular needs of the detainees under remand such as medical problems etc are recorded on the second page of the interview sheet.

[74] However, in the case of the deceased, the second page of the interview sheet was not in the bundle of documents. PW5 explained that all interview sheets were filled and given to YBGK but she only received one page of the interview sheet for the deceased from YBGK for purposes of this case. PW5 was asked about the second page of the deceased's interview sheet (B4 p. 277).

[75] It was suggested during cross-examination that in order to know whether a suspect is sick, it is important to look at the second page. PW5 explained that YBGK lawyers will always ask their clients regarding their health with or without the interview sheet. PW5 further stated that both pages were in fact sent to YBGK.

[76] It was also suggested to PW5 that the deceased's actual condition cannot be ascertained in the absence of the second page of the deceased's interview sheet. PW5 disagreed and pointed to the Magistrate's minutes in B1 p. 14 where the details were recorded. But PW5 was not sure which one referred to the deceased but particulars were recorded for all four suspects.

[77] PW5 was asked whether the suspect who informed her about the deceased's health stated the same directly to the Magistrate. PW5 said that she was the one who informed the remand Magistrate about the deceased's health because she was representing all the suspects.

[78] According to PW5, in general, there are suspects who are not aggressive as they are in handcuffs, there are suspects who are aggressive and there are suspects who do not wish to say anything. PW5 said that one of the other three detainees informed her that the deceased was unwell and needed medical attention. PW5 said that she saw that the deceased was not squatting down on the floor like the rest of the suspects but was lying down and appeared lifeless and helpless (tidak bermaya). PW5 testified that the deceased could not communicate properly as compared to the rest of the suspects. PW5 informed the remand Magistrate that the deceased and others needed medical attention including specifically mentioning kidney disease suffered by one of them. PW5 stated that the Magistrate instructed the police to ensure medical attention is provided (see B1 p. 14). However, the deceased and the rest of the suspects were taken away after remand hearings for all other cases on 9 September 2012 were completed.

[79] The next witness is PW6. He worked for LM Partners Sdn Bhd and lived with the deceased, Navintharan and several other co-workers in the same apartment provided by LM Partners Sdn Bhd. PW6 and the deceased slept in the living room space of the apartment. They stayed in the same house for about one year prior to the death of the deceased. PW6 went on to testify as to the events leading to the arrest of the deceased and Navintharan. In essence, PW6 testified that the deceased was only present when a Bangladeshi worker stated that he wished to sell his baby.

[80] The deceased then stated that his brother-in-law, PW7 was without a child. The deceased informed PW7 about the baby. PW6 testified that the deceased was arrested and subsequently Navintharan was arrested. PW6 waited for two - three days and since the deceased had not been released, he went to IPD Cheras. PW6 did not get to meet the IO. But he managed to meet a Sikh police officer in plain clothes who informed him that it is a kidnapping case and the deceased cannot be released. Further, the said officer informed PW6 that the deceased was in IPD Dang Wangi. PW6 went to IPD Dang Wangi but was not allowed to meet the deceased. PW6 testified that he did not see any injuries on the deceased's body while they were staying together. PW6 also testified during the inquest proceedings before the coroner. PW6 testified that he does not know if the deceased suffered from any disease.

[81] I turn now to the evidence of PW7. He is an important witness in this case. He was one of the co-suspects and was detained together with the deceased. They were all detained in IPD Dang Wangi. He testified that he was arrested in 2012 because he adopted a baby. PW7 went on to testify as to the events leading to his arrest. In essence, PW7 received a call from the deceased regarding the baby. PW7, his wife, the deceased and another person went to the hospital. PW7 paid RM3,000 and brought the baby back. The following day, PW7 and his wife were arrested. PW7 stated that he took the baby to IPD Cheras where the Indonesian lady came and took the baby away.

[82] At the police station, PW7 informed the police that he required dialysis. PW7 also needs to take medication and he communicated this to the police.

[83] According to PW7, in a week, he goes for dialysis three times. PW7 testified that the deceased and Navintharan also informed the police that they have medical conditions. According to PW7, the deceased had also informed the police that he needs to take medication. He said that he did not see any family members at that material time. He said that soon after the arrest, the deceased started behaving like a mad man. The deceased was restless and kept repeating that he wanted to take medication. The deceased stated this to PW7, Navintharan and the police. While in the same lock-up, the deceased did not eat or drink. At the remand hearing, PW7, the deceased, Navintharan and Siti were represented by a female Malay lawyer.

[84] PW7 and Navintharan informed the lawyer that the deceased was sick. According to PW7, the deceased could not inform the lawyer himself because the deceased was behaving like a mad man who had lost himself. PW7 said that he and Navintharan informed the lawyer during the remand about the deceased's health because they were afraid something might happen and they wanted the deceased to get medical help quickly. PW7 said that because the deceased was noisy and restless, he was transferred to a separate lock-up.

[85] According to PW7, while they were in the same lock-up, the deceased did not eat or drink. The next day, PW7 found out that the deceased had died. In cross-examination, PW7 agreed that during the remand proceedings, he and the deceased did not directly say anything to the Magistrate. PW7 stated that the deceased was behaving like a mad man and was shouting and hitting his head against the metal bars of the cell and jumping all over. The deceased was then transferred to a different cell. PW7 stated that the deceased was transferred because he was making noise. PW7 agreed that there were police patrols while PW7 was in the lock-up. PW7 agreed that he gave a statement to DSP Nazri (DW4) saying that PW7 saw the deceased knocking his head on the steel bar of the cell. PW7 agreed that he and the deceased were not beaten in the lock-up.

[86] I turn now to the evidence adduced by the witnesses for the defence. The first witness is Koperal Pilot Lanye (the second defendant) ("DW1"). During the period of remand, DW1's work schedule was as follows:

(a) 11pm 6 September 2012 to 7am on 7 September 2012;

(b) 7am to 3pm on 8 September 2012;

(c) DW1 was off duty on 9 September 2012; and

(d) 11pm to 7am on 10 September 2012;

[87] DW1 was at work with L/Cpl 151499 from 11pm on 6 September 2012 to 7am on 7 September 2012 to register suspects from IPD Dang Wangi and IPD Cheras (B4 pp. 278 - 281). Whilst on duty, DW1 received the deceased and four other suspects from IPD Cheras, namely, Navintharan, PW7, Siti and Sri Mugunthan a/l Kanapathy. The suspects were received from police personnel from IPD Cheras (D/Cpl 115328) who gave a form "membenarkan/mengeluarkan OKT ke dalam lokap". DW1 ordered D/Cpl 115328 to place the suspects in an examination place. DW1 called out the names of the suspects to cross-check with the names of the suspects listed in the form. DW1 then made a random check of the male suspects as a standard procedure to ensure that they did not carry any unauthorised articles into the lock-up. DW1 asked the suspects if they were carrying any unauthorised articles. He said the suspects did not complain about any health issues during the examination. DW1 also did not see any injuries on the suspects and the suspects were silent.

[88] DW1 was unsure in which cell the deceased was placed. Upon registration and a random check, DW1 informed the store personnel about new detainees from IPD Cheras. Then, DW1 recorded the receipt of the suspects in the station diary. DW1 stressed that the deceased did not complain about anything and the deceased was silent. He said he did know where the deceased was placed throughout the deceased's detention at IPD Dang Wangi.

[89] DW1 did not carry out any rounds as he worked as "pendaftar OKT" or the officer who registered the suspects who were brought to IPD Dang Wangi. DW1 stated that his duties are to call out the names of suspects and perform an examination before recording in the station diary. DW1 claimed that his work limited his movements as he did not make rounds like the other police personnel at the lock-up. He said he did not hear the deceased making noise or causing trouble at the lock-up.

[90] DW1 did not know whether any of the deceased's family members met the deceased. He said if the deceased's family member wished to see the deceased and if DW1 received a permission letter, then the family member may see the deceased. DW1 stated that there were no complaints from any of the suspects. DW1 stated that he did not carry out a physical examination but he did not see any injuries. He said suspects at IPD Dang Wangi are given food and drinks three times a day. If there is any emergency, like a suspect being sick, then the immediate action would be to directly call the ambulance. DW1 said he worked at IPD Dang Wangi for 17 years. However, DW1 claimed he does not know the police personnel working at the lock-up except for those who worked with him.

[91] DW1 confirmed that there are no documents to record that questions were posed to the deceased about his health and that the deceased had not complained about his health. DW1 confirmed that there are no records with regard to the food intake of the suspects.

[92] DW1 said he is static in front of the main lock-up door at the ground floor. He said family members do not have access to that area and that they only have access up to the inquiry office situated outside the main lock-up door. He said that there is a CCTV control room and there are personnel in the control room but he could not remember how many personnel were in the control room. When pressed for an answer, DW1 said there would be one personnel in the CCTV control room. DW1 confirmed that if there were personnel monitoring the CCTV, then they would be able to see and monitor suspects in the lock-up. He confirmed that there is a camera which recorded the activity in cell "I". DW1 confirmed that cell "I" does not have any cover on its cement floor for a suspect to sleep on. DW1 stated that there was access to toilet through cell "I" but agreed that when a suspect is placed inside and all doors are locked, then the suspect could not go out to the toilet.

[93] I turn now to the evidence of Koperal Zainal Bin Mohd Ali ("DW2"). DW2 has been working at the IPD Dang Wangi lock-up since 1 January 2012. He was IPD Dang Wangi's first-floor lock-up supervisor for team "C" and was in charge of ensuring that personnel on duty at cells carry out patrols. DW2 was in charge of ensuring the suspects are in good condition and that the lock-up is clean. The first-floor lock-up has five cells for suspects from IPD Cheras.

[94] He said that suspects are given food three times a day. Food is brought in plastic bags and DW2 would place the food at the netting/bars of the cells. There was no system in place which requires a record to be kept if any suspects in any cell did not eat. As such, DW2 was not able to say whether the deceased ate whilst he was in the lock-up.

[95] On 10 September 2012, DW2 worked from 3pm to 11pm. DW2 patrolled near the cells at around 3pm and found that all suspects are in good condition. DW2 saw the deceased lying down on the floor of cell "I" alone. DW2 assumed the suspect was asleep. According to DW2, usually all suspects will behave that way - asleep or sitting down or talking. DW2 then helped other personnel to receive suspects from IPD Cheras and IPD Dang Wangi, release of suspects and bail. He said the lock-up was busy from around 4pm to 6pm. The second patrol was carried out at around 7pm to distribute food to the suspects. DW2 was assisted by Muhamad Zabidi and Muhammad Hadi. They found that the deceased did not move although his name was called a few times. Thus Muhamad Zabidi informed one Kpl 76095 and all members of team C went to the deceased's cell. The said Cpl 76095 then contacted and informed D4.

[96] Subsequently, a medical assistant and a nurse came to the lock-up and confirmed that the deceased is dead. DW2 did not know why the deceased was placed in cell "I" by himself.

[97] He said his team was not informed about the deceased's transfer from cell "G" to cell "I". Throughout the period of 6 September 2012 till 10 September 2012, DW2 did not notice the deceased. He said the deceased did not make any requests or complain that he was sick. DW2 said that the deceased did not complain that he needed medicine.

[98] In cross-examination, DW2 claimed not to know the identity of Cpl 140469 who was on duty at the first-floor lock-up from 7am until 3pm (see: Daftar Pekerjaan Hari-hari p. 281 B4). DW2 claims that he has never met that person. DW2 said that Lans Koperal 151538 was the person who was scheduled to be the patroller at 7am on 10 September 2012. But he said he could not remember who was the patroller at the first floor. DW2 confirmed that D4 is the head of administration of the lock-up. DW2 claimed that he does not know why the deceased was placed in cell "I" alone. DW2 claimed that he does not know if there are any documents that would

record the reason why the deceased was placed in that cell. DW2 then said that there is no such document. DW2 confirmed that there are no records of whether the deceased ate or drank.

[99] DW2 claimed that there is a toilet in cell "I". DW2 agreed that the coroner, defence counsel and the Deputy Public Prosecutor had visited cell "I" for an inspection of the *locus in quo*. DW2 remained silent when it was put to him that during *locus in quo*, DW2 had said that there is no toilet in cell "I".

[100] Finally, DW2 said the deceased's cell at "I", which was located in the middle, does not have a toilet. DW2 also confirmed that the deceased's cell "I" does not have any wooden cover for sleeping. DW2 was taken through the CCTV recording and confirmed that the deceased looked like he was in pain, lying down on the cement floor, appeared cold and standing up beside the cell's steel bars. DW2 was shown pp. 237 to 238, B3, pictures at 7.13am on 10 September 2012 and agreed that the deceased looked like he is in real pain and that it is not normal. Referring to p. 234, B3, DW2 confirmed there was a policeman in front of the cell at 7.48am and that the deceased's condition is the same as before. DW2 was not able to identify the police officer who stood in front of the cell at 7.48am. It was put to DW2 that during the inquest, DW2 admitted that the police knew the deceased was dead at 7.48am. DW2 was silent. Subsequently, DW2 agreed. DW2 confirmed that there are no pictures from 7.48am till 7pm.

[101] Next, I turn to the evidence of Inspector Mahezal bin Md Noh ("DW3"). He was the IO for the alleged kidnapping/abduction case. Presently, DW3 works at the special investigations division (D9) Bukit Aman. DW3 had worked as an investigating officer for seven years. He said at 1pm, on 6 September 2012, he received a police report made by an Indonesian woman (B3 pp. 200-201). DW3 testified about the report. In essence, DW3 narrated that the deceased informed Ravi that his sister-in-law is without a child and had agreed to pay the medical bill.

[102] Upon paying the bill, Ravi took the baby out and later demanded RM9,600 from the Indonesian lady for returning the baby. DW3 commenced investigations for the offence of kidnapping and the suspects were arrested on 6 September 2012 at a construction site near OUG condominium (B4 p. 274). DW3 received all suspects and found that they did not suffer any injuries. DW3 stated that the deceased looked healthy. He said he asked all the suspects about their health. The deceased did not complain about his health, nor did he bring any medicine. The suspects were taken to IPD Dang Wangi lock-up. DW3 claimed that he informed the suspects' family members that a remand application would be made on 7 September 2012. He confirmed that no family members met DW3 on 7 September 2012 and that remand was allowed for four days - from 7 September 2012 to 10 September 2012. (B1 pp. 12-14). He said during the first remand the deceased was healthy.

[103] DW3 testified that the deceased's family members had his phone number. He said that there was a family member who contacted him but the person who called did not inform that the deceased was sick and required medicine. According to DW3, on 6 September 2012 itself, he recorded statements from all suspects at IPD Cheras. DW3 testified that Navintharan and the deceased did not complain about any health issues. The deceased could speak well and cooperate well.

[104] DW3 testified that PW7 informed him that he has diabetes, hypertension and also kidney problems and needs dialysis three times a week. PW7's wife (Siti) informed DW3 that she has diabetes and hypertension. DW3 stated that all suspects were in good condition at that time.

[105] On 8 September 2012, all the suspects were in IPD Dang Wangi lock-up and were not taken out because it was a Saturday. On 9 September 2012 (Sunday), the suspects were taken before a Magistrate for the second remand application. DW3 testified that at that time, the deceased appeared "tidak sihat dari segi mentalnya" and was making a scene at his lock-up. DW3 did not take any action because the deceased had not complained before this about health issues. He said sometimes suspects will pretend to be sick in order to seek attention to be released from investigation. Thus, DW3 stated that this is a normal situation.

[106] DW3 also testified that the deceased "meracau-racau membuat bising" in the remand hearing room and that this is a normal act for suspects to try and get themselves out of detention. He said he only made the remand application and that it is up to the Magistrate whether to allow the extension of remand.

[107] He said the Magistrate stated that the suspects were to be given medical attention, "Jika keadaan memerlukan". The instruction by the Magistrate was "beri rawatan kpd OYDS (1)-(4) jika keadaan memerlukan".

[108] As such, DW3 claimed the Magistrate's directive for medical treatment to be given was "not specific". DW3 stated that during the inquest he testified that "tidak terlintas saya dalam keadaan itu dia memerlukan medical attention" because the deceased did not complain about his health. But the deceased was in the condition of "meracau-racau" and making noise during remand application. He said such abnormal behaviour by suspects is normally to seek compassion from the police to release the suspect and that this is frequently done by suspects in front of the Magistrate or police. (B2 p. 51). Ultimately, the remand was extended from 10 September 2012 to 12 September 2012. The suspects were returned to their cells. DW3 does not know which cell the deceased was placed in. He said the suspects were in the care of police lock-up personnel. During the inquest DW3 said, "saya tidak pasti bahawa keadaan beliau memang memerlukan beliau dirujuk ke hospital ... Saya tidak hantar hospital kerana saya rasa macam dia main-main" (see: notes of inquest at p. 50 B2).

[109] According to DW3, on 10 September 2012, the investigations papers were completed. Around 11am, one Loga and two ladies came to meet DW3 to ask for the release of all suspects. They were informed that the suspects cannot be released until directions were obtained from the Deputy Public Prosecutor ("DPP"). The investigation papers were referred to DPP Kuala Lumpur at around 3pm. The DPP Kuala Lumpur then directed DW3 to refer the investigation papers to DPP Putrajaya for further directions.

[110] At 7.30pm, DW3 was informed that the deceased had died in the lock-up. DW3 immediately went to IPD Dang Wangi. He reached IPD Dang Wangi at 9pm and saw the body of the deceased lying on the floor (B3 pp. 246-248). DW3 said he did not know that the deceased had been making noise and causing trouble throughout his detention as no one informed him about it.

[111] DW3 received the deceased, Navintharan, PW7 and his wife at around 7 to 8pm on 6 September 2012 at IPD Cheras. At around 7pm there were many family members of the suspects. Because there were too many of them, all claiming to be family members, DW3 met with only one person - Loga. Loga did not say that the deceased needed medicine for hypertension. DW3 stated that the meeting with Loga was recorded in his investigation diary (ID) but the ID is not in court. DW3 said he asked all the suspects if they have health problems or any complaints regarding the arrest. They did not have any complaints save for PW7 and his wife who stated that they were sick. PW7 stated that he is a kidney patient who requires dialysis three times a week. DW3 confirmed that none of the suspects had any physical injuries. DW3 stated that he recorded the above details in his ID but the ID is not in court. DW3 agreed that throughout remand, the plaintiffs had attempted to meet the deceased but they could not. DW3 agreed that the deceased's condition changed from normal to mentally abnormal. DW3 confirmed that he did not make any attempts to send the deceased to hospital although he admitted that the deceased did not appear to be mentally normal.

[112] DW3 confirmed that PW7 was present at the second remand hearing. DW3 said he did not know whether PW7 informed the Magistrate that the deceased needed treatment. He was also not sure what exactly was said by PW5 to the remand Magistrate. DW3 confirmed that PW7 was never sent for dialysis. DW3 claimed that he is not an expert and does not know the risks if a patient did not go for dialysis. DW3 claimed that he had asked PW7 first and was told that he had just undergone dialysis. DW3 disagreed that his failure in his duties had caused the deceased's death. DW3's testimony on this topic is as follows:

> Q: Arahan saya, sejak 07hb September sehingga 10hb September ataupun 09hb September, 07 hingga 09, terdapat perubahan pada perlakuan Chandran Perumal, daripada normal kepada tidak normal, kamu setuju?
>
> A: Ya.

Q: Malah dalam keterangan kamu, kamu kata dia seolah-olah tidak sihat dari segi mentalnya. Dalam keterangan kamu di perenggan 9, Jawapan 9, kamu kata, The deceased ini dalam keadaan tidak sihat dari segi mental. Kamu dah perasan, kamu dah tahu orang ini dah tak betul. Ada usaha kamu buat untuk menghantar The deceased ini ke Hospital untuk rawatan?

…

Q: Ada usaha kamu buat sebagai orang yang telah melihat dan kamu kata dia ni tak elok, tidak sihat dari segi mentalnya, ini perkataan kamu sendiri. Ada usaha kamu buat untuk hantar si Chandran ini kepada hospital untuk rawatan?

A: Saya melihat Chandran ini pada …

Q: Ada buat atau tidak, soalan saya mudah?

Court:

Tak apa, nanti boleh bagi penjelasan yang lanjut. Sekarang just jawab dia punya soalan sajalah.

Q: Senang sahaja, mudah, ada?

A: Tiada.

Q: Kamu juga mengatakan kamu telah tidak mengambil apa-apa reaksi ataupun tidak mengambil apa-apa tindakan sebab tidak pernah mengadu tentang masalah kesihatan dan terdapat juga OKT yang pura-pura berkeadaan sedemikian. Bermaksud, kamu kata Chandran ini, walaupun kamu dah kata dia ni dari segi mentalnya dah tak elok, dah tak baik tak sihat, kamu kata kamu tidak mengambil tindakan kerana beliau berpura-pura. Soalan saya, adakah kamu berkelayakan doktor?

A: Tidak.

Q: Kamu setuju semasa tahanan reman kedua, ada peguam YBGK yang hadir?

A: Setuju.

Q: Dan semasa peguam YBGK itu hadir, beliau juga telah memklumkan kepada Majistret bahawa Chandran ini memerlukan rawatan?

A: Tak pasti.

Q: Kamu hadir semasa reman?

A: Hadir.

Q: Antara kamu tahu atau tak tahu?

A: Tak tahu.

Q: Tidak tahu sama ada Peguam ada maklumkan atau tidaklah?

A: Ya.

Court:

What, sorry?

PC:

During the remand proceedings.

Court:

The last what is it?

PC:

Tidak tahu.

Court:

And then after, what did you said, he is not sure that the lawyer said Chandran needs?

PC:

Complaint about the medical condition, he says he doesn't know.

…

Q: Ada dicatitkan di dalam ID?

A: Semasa tahanan reman tiada catit, balik baru catitlah.

Q: No, ada kamu catit bahawa peguam ada maklumkan kepada Majistret dalam ID, ada catitkan dalam ID, Peguam cakap orang ini perlu hantar kepada hospital, perlu bantuan?

A: Tiada.

Court:

So his answer was, tak catit?

PC:

Tidak.

Q: Saya hairan ya Inspektor, kamu setuju kalau saya cadangkan dialysis buah pinggang ini penyakit yang serius?

A: Ulang balik?

Q: Dialysis bermaksud kena cuci darah dalam erti kata biasa, serius, kamu setuju?

A: Serius?

Q: Serius tidak serius, very simple?

A: Tidak serius.

Q: Dialysis tak serius?

A: Saya bukan pakar nak tanya serius tak serius. Saya hanya tahu sahaja.

Q: Saya tanya orang rata-rata kat mana-mana pun, kalau saya cakap dengan orang, dialysis ni serius. Banyak implikasi dia, boleh mati kalau tak buat betul, boleh dapat jangkitan kalau jarum tak betul. Macam-macam risiko, kamu tak tahu ya?

A: Tak tahu.

Q: Kamu tahu dalam Akta Polis ini tugas tanggungjawab polis ini, untuk menjaga keselamatan orang-orang di bawah tahanan kamu?

A: Setuju.

[113] I turn now to DW4's evidence. DW4 was the investigation officer who investigated the death of the deceased. He was the person who came on the scene after the event. He disagreed that there was any negligence on the part of the police or that the death of the deceased was due to the negligence of the police. He also disagreed with the findings of the coroner who

concluded that the death of the deceased was due to the negligence (omission) by the police. He said that he interviewed Navintharan and PW7. He said that D4 was present at cell "I" where the deceased's body was found. DW4 said, D4 had told him that the deceased was placed in cell "I" alone as he was making noise and disturbing other detainees. DW4 investigated the death of the deceased to determine whether there were any criminal elements. He found there were none.

[114] I turn now to the Lock-up Rules 1953 which forms the main plank of the plaintiffs' case against the defendants. The following parts of the Lock-up Rules are relevant for present purposes.

ADMISSION AND DISCHARGE

…

10. The Medical Officer shall so far as possible examine every prisoner as soon as possible after admission to a lockup and shall certify whether the prisoner is fit for imprisonment and, if convicted the class of labour which he can perform.

TREATMENT OF PRISONERS

13. Every prisoner shall be supplied with bedding which shall be changed and washed as often as may be necessary but never less than once a month.

14. Notices in English, Romanised Malay, Chinese and Tamil setting forth the facilities to which prisoners are entitled as regards communication with friends or legal advisers, the granting of bail and the provision of medical assistance shall be displayed at the entrance to each lockup. In all cases where it is necessary the contents of the notice shall be communicated to all prisoners in a language they understand.

…..

STAFF

35. (1) *The Officer-in Charge or the Deputy-Officer-in-Charge shall frequently and never less than once a day inspect all parts of each lockup and shall see every prisoner confined therein at least once in every twenty-four hours and shall visit each lockup at an uncertain hour of the night at least once in every seven days.*

(2) A police officer shall be detailed daily by the Officer-in-Charge to visit cells at least once each night to see that they are secure and to check the number of prisoners.

36. The Officer-in-Charge or the Deputy-Officer-in-Charge **shall without delay report to the Medical Officer any case of apparent mental disorder or of injury to or illness of any prisoner**.

37. The Officer-in-Charge or the Deputy-Officer-in-Charge shall upon the dangerous illness or death of any prisoner give immediate notice thereof to the most accessible known relative of such prisoner.

38. The Medical Officer shall visit each lockup whenever requested to do so by the Officer-in-Charge, and he shall enter in the Journal his comments on the state of the lockup and the prisoner confined therein.

39. **The Medical Officer shall notify the Officer-in-Charge of any prisoner who appears to him to be mentally disordered or of unsound mind**.

40. Whenever the Medical Officer is of the opinion that the life of any prisoner will be in danger by his continued confinement in a lockup or that any prisoner is totally and permanently unfit for confinement, he shall immediately state his opinion and the grounds thereof in writing to the Officer-in-Charge, who shall forthwith forward the same to the President of a Sessions Court or to a First Class Magistrate for transmission to the Menteri Besar of the State or to the Resident Commissioner of the Settlement, as the case may be.

41. The Medical Officer shall whenever he visits a lockup to examine the food supplied to prisoners and shall enter in the Journal his comments thereon.

SUBORDINATE POLICE OFFICERS AND CONSTABLES

42. Subordinate police officers and constables shall at all times be responsible for the safe custody of prisoners under their charge and shall count the prisoners frequently and always:

(a) on receiving charge;

(b) on handing over charge; and

(c) on leaving any building or work,

and shall enter the muster in the Journal and shall sign the same.

(emphasis added)

Discussion And Analysis

[115] The starting point in this analysis is the event which took place on 6 September 2012, when the deceased and three others who were suspected of being involved in the abduction of a baby were arrested by the police. Apart from the deceased, the others who were arrested were PW7, his wife Siti, and Navintharan. Navintharan has since died. None of the suspects was ever charged for kidnapping of the infant. Indeed, PW6 had given a lucid explanation as to the circumstances leading up to the infant being taken by PW7 and his wife, Siti.

[116] As the issue of kidnapping is only part of the background narrative, I shall not belabour the point except to say that the deceased had no prior criminal convictions. After the deceased had been arrested, he was taken to IPD Cheras, where he was detained for about half an hour and then sent to IPD Dang Wangi on the instructions of DW3.

[117] According to DW3, all four suspects were sent to IPD Dang Wangi. He said that there were two remand applications. The first remand application was done on Friday, 7 September 2012 and the second remand application was conducted on Sunday, 9 September 2012. The remand applications were done in the remand room located within IPD Dang Wangi. According to DW3, the room is fairly small and gets quite congested. DW3 and counsel for the suspects have to stand and address the Magistrate, whereas the suspects would have to squat and stand when their name is called up. None of the relatives of the suspects was present during both remand applications. Indeed, in para. 26(a), (b) and (c) of the defence dated 3 November 2015, it was pleaded that the relatives were not allowed to see the suspects as investigations were still on-going. It reads as follows:

(a) Pada 6 September 2012, ahli keluarga Si mati telah pergi ke IPD Cheras dan dapat berjumpa dengan Si mati.

(b) Pada 7 September 2012 dan 10 September 2012, ahli keluarga Si mati tidak dibenarkan berjumpa dengan Si mati kerana siasatan dijalankan ke atas Si mati.

(c) Manakala pada 8 September 2012 dan 9 September 2012 iaitu hari Sabtu dan Ahad, ahli keluarga mana-mana orang kena tangkap termasuk Si mati tidak dibenarkan berjumpa kerana mengikut amalan dan Kaedah-Kaedah Lokap 1953, tiada perjumpaan sedemikian dibenarkan pada hari Sabtu dan Ahad.

(p. 48 Bundle of Pleadings)

[118] In this regard, DW3 said quite unequivocally that members of the public and relatives are not allowed into the remand room. Thus, it is quite obvious that even if the relatives of the suspects wanted to be present during the remand, they could not do so as the procedures at IPD Dang Wangi are such that the relatives and other interested parties will not be allowed into the remand room. Of course, this is lamentable as the suspects have a right to have their relatives or loved ones present during remand as the Magistrate concerned may gain invaluable and perhaps critical information of and concerning the suspect under remand including on matters relating to the health of the suspect, which may require close monitoring and immediate attention. The problem of relatives not being able to enter the remand room would not exist if the remand application had been made before the Magistrate in open court.

[119] I now refer to the minutes of the Magistrate in respect of the proceedings for continuation of remand under s. 117 of the Criminal Procedure Code. According to the minutes, the suspects who were brought before the Magistrate in relation to the kidnapping case are:

(1) Chandran A/L Perumal KPT: 650720107143

(2) N. Navintharan A/L Narasiaman KPT: 630226055239

(3) Rahiman Binti Abdul Rashid No. KP: 640922105921

(4) Siti Rohani Bin Abdullah No. KP: 620816055256

[120] The following handwritten notes were made by the Magistrate:

(1) OYDS 1 - H/S - sakit jiwa - tiada aduan

(2) OYDS 2 - H/S - asthma - tiada aduan

(3) OYDS 3 - H/S - sakit buah pinggang - tiada aduan

(4) OYDS 4 - H/S - sakit darah tinggi - tiada aduan

[121] Under the heading of hujahan peguam/aduan suspek/rayuan, the Magistrate made the following notes:

(1) Siti Rohani - sakit darah tinggi

(2) OYDS 3 - sakit buah pinggang

(3) OYDS 2 - sakit asthma/ada batuk

(4) OYDS 1 - isteri tidak kerja

Mahkamah: Beri rawatan kepada OYDS (1) - (4) jika keadaan memerlukan.

[122] As I said earlier, the complaint here is that the deceased's rights under art. 5(1) Federal Constitution were violated. Article 5(1) reads as follows:

5. Liberty of the person

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

[123] The point that was made by the plaintiffs is that by detaining the deceased, the police had deprived him of his liberty and taken full control over him. As such, the law imposes on the police, as the detaining authority, an extraordinary duty of care to ensure that the detainee is not harmed and does not harm himself. Reference was made to the decision of the High Court of Australia in *Howard v. Jarvis* [1958] 98 CLR 177 HCA involving a case where the detainee had perished in a fire which broke out in the cell. In that case, the court enunciated that there was a common law duty of care on detaining authorities and said:

> We feel no doubt that the learned judges of the Supreme Court of Tasmania were right in holding that Howard was subject at common law to a duty to exercise reasonable care for the safety of Jarvis during his detention in custody. He had deprived Jarvis of his personal liberty, and assumed control of his person. In arresting and detaining Jarvis he was no doubt acting lawfully and properly and in the due execution of his duty, but he was depriving Jarvis of his liberty, and he was assuming control for the time being of his person, and it necessarily followed, in our opinion that he came under a duty to exercise reasonable care for the safety of his person during the detention. If authority be needed for his proposition, ample authority is found in the cases cited by the learned Chief Justice of Tasmania.

[124] In *Reeves v. Commissioner of Police of the Metropolis* [2000] 1 AC 360 HL the issue was whether the prison authority was liable for the death of the inmate who committed suicide. The following passages at pp. 366, 368-369 are instructive:

> The police and prison service have long been aware that prisoners are more than usually likely to attempt suicide or self-injury. In 1994 the Director of Prisons issued an Instruction to Governors (IG 1/1994) which said: "The care of prisoners who are at risk of suicide and self-harm is one of the Prison Service's most vital tasks." The risk of suicide is particularly high among prisoners on remand facing a new environment and an uncertain future. (p. 366)
>
> ....
>
> The trial judge (Judge White) found that having regard to the fact that the police knew that Mr. Lynch was a suicide risk, they owed him a duty to take reasonable care to prevent him from committing suicide while being held in custody. He also found that the police had been negligent and in breach of this duty by failing to shut the wicket hatch after he had been put in the cell. There has been no appeal against these two findings. (p. 366)
>
> ...
>
> My Lords, I can understand this argument, although I do not agree with it. It is not, however, the position taken by the commissioner. He accepts that he owed a duty of care to Mr. Lynch to take reasonable care to prevent him from committing suicide. Mr. Lynch could not rely on a duty owed to some other hypothetical prisoner who was of unsound mind. The commissioner does not seek to withdraw this concession on the ground that Mr. Lynch has been found to have been of sound mind. For my part, I think that the commissioner is right not to make this distinction. The difference between being of sound and unsound mind, while appealing to lawyers who like clear-cut rules, seems to me inadequate to deal with the complexities of human psychology in the context of the stresses caused by imprisonment. The duty, as I have said, is a very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives. (pp. 368-369)

[125] The following passage in *Halsbury's Laws of England* - para. 1140 is also relevant on the topic of duty of care of prison or detaining authorities. It reads as follows:

> 1140. Duty of care. The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, including the prisoners. Actions will lie, for example, where a prisoner sustains injury at the hands of another prisoner in consequence of the negligent supervision of the prison authorities, with greater care and supervision, to the extent that is reasonable and practicable, being required of a prisoner known to be potentially at greater risk than other

A prisoners, or if negligently put to work in conditions damaging to health; or if inadequately instructed in the use of machinery; or if injured as a result of defective premises.

[126] The position is no different in Malaysia. In *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15 CA
B (at pp. 41, 46, 47) the Court of Appeal made the following pronouncements on the duty of care of the police authorities in a case of death of a detainee whilst in police custody. It was a case where the conduct of the police was egregious, to say the least. The deceased in that case died as a result of being beaten by police officers. In that case, the Court of Appeal approved the
C award of exemplary damages, although this appears contrary to s. 8(2) of the Civil Law Act 1956. I will pick up this point for discussion in the later part of the judgment. For now, on the issue of duty of care, the following paragraphs of the judgment deserve reproduction.

> [47] ... *The police force is a public professional body and as in other professional*
D *bodies there exist duties of care in their discharge of their powers. In the context of the police force, it is their standard operating procedure (SOP) and that should be subject to scrutiny by the court of law. As to what that duty of care and standard of care are depend on the circumstances of each individual case and it is for the courts to determine what that duty and standard of care are* as was done in the Federal Court case of *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229;
E [2007] 1 MLJ 593.
>
> [48] In *Foo Fio Na* case, the Federal Court quoted with approval Callaghan J in *Hajgato v. London Health Association* [1982] 36 OR (2d) 669, where in an action in negligence in respect of personal injuries sustained during post-operative case the learned judge stated as follows:
>
F > In my view however, **a court has a right to strike down substandard approved practices when common sense dictates such a result**. No profession is above the law and the courts on behalf of the public have a critical role to play in monitoring and precipitating changes where required in professional standards.
>
G (emphasis added)

[127] Having regard to the principles of law as enunciated in the cases referred to above, I turn now to the case at hand. The first issue is a legal one. The issue is whether the police have a duty of care towards detainees who are held in police lock-up. In my view, there is no question that there
H is a duty of care which is owed by the police to those who are held in detention. No doubt, the detention itself may be lawful in the sense that there may have been a valid basis for their arrest. The issue is not about the arrest or the lawfulness of the detention or remand order but whether the detaining authorities owe a duty of care to the detainees whilst they are in detention
I in the police lock-up.

[128] In my view, both under common law and under statute, there is a duty of care to ensure that the detainee is not harmed by the police or by other detainees or that they do not harm themselves. Insofar as the common law

is concerned, the principle is well established by the cases referred to above and it is trite that detaining authorities do owe a duty of care to ensure that the detainees/prisoners are healthy and are given proper medical care during the period of incarceration. There is also a duty to ensure that the detainees are not harmed by the detaining authorities or by other inmates or even self-harm or suicide. In this regard, it is relevant to refer to the judgment of Lord Bingham of Cornhill in *Amin, R (on the application of) v. Secretary Of State For The Home Department* [2003] UKHL 51 [2003] 4 All ER 1264, [2004] UKHRR 75, [2004] 1 AC 653, [2004] AC 653, [1998] 1 WLR 972, [2003] UKHL 51, 15 BHRC 362, (2004) 76 BMLR 143, [2003] 3 WLR 1169, [2004] HRLR 3 which lucidly illustrates the general duty of care that is imposed on the police or prison authorities. In this context, it is necessary to acknowledge that the late Lord Bingham has been one of the greatest proponents of the rule of law in recent times. He drew inspiration from Indian jurisprudence and said,

> A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746 at 767:
>
> > There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.
>
> Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm: *Reeves v. Commissioner of Police of the Metropolis* [2000] 1 AC 360. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.

[129] Insofar as statutory duties are concerned, in a general sense, reference may be made to s. 20 of the Police Act 1967 and the Police Regulations 1952. But the more specific statutory duty arises under the Lock-up Rules 1953, which the defendants here assert has been fully complied with. I have comprehensively referred to the Lock-up Rules 1953 in the earlier part of this judgment. Based on the Lock-up Rules 1953 referred to above, it is clear that the police have a positive duty to ensure that detainees who are sick are duly attended to and in particular, when a detainee suffers from any form of mental illness, then special attention has to be given to this situation and appropriate steps have to be taken accordingly (see: r. 36 of the Lock-up Rules 1953). In my view, the Lock-up Rules 1953 are a complete code which governs the handling and management of detainees. Thus, detainees would be safe from harm or self-harm if the detaining authorities abide by the Lock-up Rules 1953 and ensure that they are fully complied with. Hence, to conclude on this point, it is my view that the police do have a duty of care

towards those who are under detention during investigations. In the present context, the content of that duty is regulated *inter alia* by the Lock-up Rules 1953.

[130] The only remaining issue is whether in the present case, the police had in fact breached their duty of care. And so the question is: were the police aware that the deceased was ill and needed to take medication. PW1 said that she tried to inform the police of the deceased's medical condition but no one entertained her queries when she went to IPD Cheras. It is unclear whether she also went to IPD Dang Wangi. It is also unclear whether she was one of the two Indian ladies who went to see DW3 together with Loga on 10 September 2012. PW7 said that all of the suspects had informed the police that they were sick and on medication. He said that the deceased also informed the police that he was sick and needed medication. DW3 said that whilst PW7 and Siti had said that they were on dialysis, the deceased did not make any complaint about his health. The first point is whether DW3 did in fact ask the suspects (including the deceased) about their health.

[131] Here, it is relevant to refer to Navintharan's police report (p. 206 B3) and his evidence at the inquest which suggests that the police were informed that the deceased was on medication. PW7 also testified that all of them informed DW3 that they had health issues and needed treatment. DW3 said that PW7 and Siti had informed him that they were on dialysis and taking oral medication as well. But as it turned out, DW3 took no steps to arrange for dialysis for either of them at the hospital.

[132] He merely took comfort in the fact that PW7 had told him that he had just completed his dialysis. I have no reason to disbelieve PW7's evidence where he said that the deceased had informed the police that he needed to take medication.

[133] I also accept PW7's evidence when he said that the deceased was shouting in the lock-up that he needed to take medication. There is also PW1's evidence who said that on one occasion when she went to the police station, she informed the officer (who she did not identify) that her husband needed to take medicine and was told that they (the police) had medicines. At any rate, even if one discounts the evidence of PW7 and PW1 (which I am not inclined to do) and the untested evidence of the late Navintharan, as to whether the police were informed of the deceased's medical condition or that he needed to take medication, it is imperative to pay close attention to the events that transpired on Sunday, 9 September 2012 during the remand proceedings.

[134] Here, I have no hesitation in accepting the evidence of PW5, who was a YBGK volunteer lawyer and also a disinterested witness. She said that PW7 and Navintharan had told her that the deceased was sick and needed treatment and medication. In turn, PW5 informed the Magistrate of the deceased's condition and asked that he, together with the other detainees be sent to hospital for treatment. I have no reason to doubt her evidence.

[135] Indeed, PW5 must have brought up matters relating to the medical condition of the suspects which explains why the Magistrate directed the police to seek treatment for the four suspects if the situation warranted it. The words used by the Magistrate were, "beri rawatan kpd OYDS (1)-(4) jika keadaan memerlukan" which DW3 conveniently interpreted as a non-specific directive. PW5 said that during the remand, the deceased was non-communicative and looked lifeless.

[136] In short, he looked ill. But DW3 said that this is quite normal as detainees would usually pretend to be sick or behave abnormally so that they would gain the sympathy of the police or the Magistrate and procure an early release from police custody. That may well be the case in some cases but the question is whether it was so in this case. Obviously not, as events have shown that the deceased was truly ill and died the very next day.

[137] It may be recalled that DW3 candidly admitted during cross-examination that he knew or was aware that the deceased had become mentally abnormal in terms of his behaviour. Yet he took no steps to arrange for the deceased to be sent to the hospital for investigations to be conducted and for treatment to be given accordingly. He merely stereotyped the deceased's abnormal behaviour as mere pretence and left it at that. As far as DW3 was concerned, the deceased was under the care of the IPD Dang Wangi officers.

[138] Although he was the IO for the case, he took the easy route and relinquished or abdicated responsibility in terms of responding to the deceased's medical condition. I am mindful that it is harsh to conclude that DW3 had relinquished or abdicated his responsibility in failing to send the deceased to hospital. But that is the only conclusion that I can reach and my conclusion as to DW3's indifferent attitude towards the health/medical condition of those whom he was investigating is bolstered by the fact that despite knowing of PW7's and Siti's kidney and hypertension conditions, he failed to send them to the hospital for dialysis and medication.

[139] In fact, he said that he did not think that those undergoing dialysis had a serious medical condition. Eventually, he said that he was not a doctor and so he did not know. First, DW3's answer that dialysis is not an indicator of serious medical condition is bizarre and baffling to say the least. Secondly, if DW3 did not appreciate the seriousness of the medical condition of PW7, Siti and that of the deceased, who he knew was behaving abnormally, he, as the IO, should have arranged for them to be sent to the hospital where a proper medical assessment could be made. And so, it is clear that it made no difference one way or the other to DW3 whether the suspects were sick or not and he appeared not to be concerned about the medical needs of the detainees.

[140] From the evidence, DW3 at the very least knew that the deceased was behaving abnormally and so, he was duty bound to have him assessed by a competent medical practitioner to determine whether the deceased had any mental condition or whether there was any underlying medical condition which required medical intervention.

[141] From the evidence of PW3, it is clear that if the deceased was seen by a medical practitioner, his medical condition might have been determined and appropriate steps could have been taken to stabilise his hypertension and his heart condition. In short, had DW3 responded to the Magistrate's directive and duly sent the deceased to the hospital, the deceased's life may well have been saved.

[142] I therefore completely agree with the verdict of the coroner that the deceased had died needlessly and his death could have been averted had the police performed their duties and responsibilities. In my view, if the police, meaning DW3 and those officers on patrol duty and those monitoring the CCTV at IPD Dang Wangi had done their job, they would have observed that there was something not quite right with the deceased especially in the early hours of the morning of 10 September 2012 and they should have taken steps to intervene and send the deceased to hospital but it appears that everyone who had a duty to look after the detainees as per the Lock-up Rules 1953, had abdicated their responsibilities and washed their hands off the matter.

[143] In my view, the answer given by those who were in charge of the lock-up that it is normal for detainees to be sleeping all the time is rather too convenient, disingenuous and unacceptable in these circumstances. Of course, it may be normal for detainees to be sleeping for long periods. But the deceased in this case was shouting and behaving abnormally before he was sent to cell "I" and his behaviour became different thereafter as may be seen from the photographs which showed him in various positions of distress and pain and in a crouching position before he permanently slept on his right side, which was the position that his body was found in. Further, it would also have been apparent to the patrollers at IPD Dang Wangi that the deceased had not eaten any food. It does not appear that any of the patrollers had gone into the cell or even asked the deceased why he had not eaten his food.

[144] Had they done so, they may have been alerted to the fact that the deceased was gravely ill. DW3 kept saying that he gave his contact number to one Loga and that no one from the deceased's family contacted him to say that the deceased needed to take medication. But the question is whether DW3 took Loga's contact number and whether he contacted Loga to find out if the deceased had any medical conditions especially in light of the fact that DW3 had himself acknowledged that the deceased had turned from mentally normal to mentally abnormal. This issue must also be viewed in light of DW3's admission that the deceased's family tried to see him but were not able to.

[145] Here, I find PW1's evidence that she tried to see her husband and had told the police that he was sick and needed to take medication to be probable, although she may have been unclear as to the dates when she went to the police station or the identity of the police officer who she spoke to. As far DW3 was concerned the deceased was probably pretending to be sick. That was a fatal assumption on DW3's part. It was fatal not for DW3 but for the deceased. DW3's nonchalant attitude can be seen from the fact that he did not even know what PW5 had said to the Magistrate during the remand on 9 September 2012. He said that at IPD Cheras, he asked the suspects whether they had any health problems and the deceased did not complain of any health problems. If that is the case then that would (or should) have been minuted in DW3's ID. But the ID was not produced in court for inspection. In the circumstances, I scarcely believe that DW3's ID would exonerate him in terms of what he knew about the deceased's medical condition.

[146] Although in the defence, it was stated that evidence would be produced at the trial to show that the Lock-up Rules 1953 were fully complied with, at the end of the day I found that there was hardly any or any credible evidence to show that the Lock-up Rules 1953 had been complied with.

[147] In fact, from the evidence that was presented, the only conclusion that I can and have reached is that the Lock-up Rules 1953, specifically with respect to the duties of the police to ensure that the detainee is promptly given medical attention and to determine if he was having any mental abnormality were egregiously breached or ignored by the defendants.

The Outcome

[148] In the result, on liability I am satisfied that the plaintiffs have succeeded in proving on a balance of probabilities that the defendants had breached their duty of care which was owed to the deceased and that the death of the deceased was due to their negligence in failing to send the deceased to the hospital for treatment in circumstances where it was apparent that the deceased was not behaving normally and where the police were already informed either directly or indirectly that the deceased was unwell and required medical attention. As such, I am of the view that liability for negligence (by omission) and public misfeasance has been established against the defendants. I turn now to consider the reliefs.

Bereavement

[149] I will start with the claim for bereavement. I award RM10,000 for bereavement to the first plaintiff as the (spouse) widow of the deceased under s. 7(3A) of the Civil Law Act 1956. There will be interest on the sum of RM10,000 at 5% per annum from the date of filing of the action, ie, from 8 September 2015 until the date of full payment or realisation.

Loss Of Dependency

[150] Next, insofar as the claim for loss of dependency is concerned, the computation is as follows. The deceased was 47 years old at the time of his unfortunate death and was gainfully employed. There was no argument proffered by the defence to suggest that the deceased was not in good health at the time of his death such that his dependants are disentitled from making a claim for dependency. Indeed, despite his medical condition of hypertension, the evidence showed that the deceased was able to carry out his tasks as a driver for LM & Partners Sdn Bhd. I see no reason why the claim for dependency should be disallowed on the basis of the pre-existing hypertension of the deceased. As such, it is my view that the dependents of the deceased are entitled to loss of dependency on the basis of a multiplicand of RM3,000 per month. The multiplier is calculated as follows: 55-47= 8 divided by 2 = 4 years X 12 = 48 months.

[151] Hence, the award for dependency is RM3,000 x 48 months = RM144,000 with interest at 5% per annum from the date of filing of the action, ie, from 8 September 2015 until the date of full payment or realisation.

Exemplary Damages

[152] I turn now to exemplary damages. These are awarded for breaches of constitutional rights or where the defendants' conduct is reprehensible and oppressive or high-handed. This claim is made by the estate of the deceased and is not part of the dependency claim. The plaintiffs are administrators of the estate of the deceased. Section 8(2) of the Civil Law Act 1956 clearly states that the estate of a deceased person is not entitled to exemplary damages. But the Court of Appeal in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15 CA held that where death is caused as a result of conduct by a public authority which is violative of the deceased's constitutional rights, then the claim is not a tort claim but rather a redress for constitutional infringement or public misfeasance. The jurisprudence that was developed by the Court of Appeal on this point is found in the following paragraphs of the judgment.

> [65] Exemplary damages are damages awarded for cases when the courts find the actions of the wrongdoers to be reprehensible and a conscious complete disregard of another's rights. It is not compensatory in nature but intends to reform or deter the defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit. Lord Devlin in the often quoted case of *Rookes v. Barnard* (19643) AC 1129 puts it this way:
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> > There are certain categories of cases in which the award of exemplary damages can serve useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into civil law a principle which ought logically to belong to criminal.

[67] Both articles of the Federal Constitution speak for themselves and need no further explanation from us. The basic premise of these articles is universal and that is every human life is sacred and every citizen of this country, including suspects of crimes or convicted criminals, is expected to be treated with human decency during their detention and the protection of the law. In the context of this case, a person's life was deprived of or taken away not in accordance with law as commanded by the Federal Constitution but by means which did not fit any semblance of human decency.

[74] That said, we see no reason why we should not adopt the approach of the House of Lords in the circumstances of this case. Accordingly we find that where there is a breach of a constitutional right by a public authority, s. 8(2) of the Civil Law Act does not apply and the courts cannot be barred from awarding exemplary damages. Our view is fortified by the fact that in 1956, the year in which the Civil Law Act was legislated, there was no Federal Constitution.

[75] We further say that the public tort of public misfeasance had not been developed yet in 1956 and it can be said that when the Civil Law Act was enacted, it was only in respect of private tortious actions. Hence we are of the view that s. 8 of the Civil Law Act only applies to private torts in so far as the prohibition of awarding exemplary damages.

[76] There is another reason for our decision. In Malaysia, we do not have an ombudsman or an Independent Police Complaint and Misconduct Commission despite the recommendation of a Royal Commission for Police Reform (2005). In the case before us, the intention of the plaintiff is clear and that is to hold the defendants responsible and accountable for their unlawful action as public officers. It is not just a case of merely being compensated, it is more and that is to ensure that the public officials who are supposed to be the guardians of the Constitution are brought to task and that such unlawful actions should not happen again. Remand prisoners are innocent until convicted in a court of law and like other citizens they are entitled to their basic human rights during their lawful detention. Hence we are of the view that there is no reason that the courts should not take the role of an ombudsman as is done in the Canadian jurisdiction - see Allen M Linden - "*Tort Law as Ombudsman*" and *McMaster v. The Queen* 2008 Federal Court 1158. That is to say the courts do so within the confines of their judicial roles.

[77] As to whether exemplary damages should be awarded, we see no clearer case as in this case where it must be given to reflect the severity of the breach. The circumstances in which the deceased's constitutional right was breached have been dealt with in detail by the learned judge and affirmed by us earlier in our grounds. Any reasonable tribunal in our view would conclude that this is an appropriate case to award exemplary damages. Not to award such exemplary damages would in our mind be 'not attending to the mutilation with the appropriate care'.

[153] However, in *Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn. Ghaur Chandram Murugesu & Satu Lagi Rayuan* [2016] 3 CLJ 210 CA another coram of the Court of Appeal concluded that exemplary damages

could not be claimed by the estate of the deceased. In that case, the deceased was assaulted by fellow inmates in prison and died as a result of the injuries. The plaintiffs claimed that the deceased died as result of the negligence of the prison authorities and breach of the statutory duties under the Prisons Act 1995. The High Court awarded a sum of RM100,000 as exemplary damages.

[154] The Court of Appeal examined the purpose of and the circumstances when exemplary damages may be awarded and said:

> [27] Ganti rugi teladan adalah bertujuan untuk menghukum defendan-defendan dan mencegah mereka dari mengulangi perbuatan terkutuk tersebut dan juga untuk mencegah orang lain dari melakukan perbuatan yang sama. Ganti rugi teladan hanya boleh diawardkan jika ia telah memenuhi kategori-kategori yang ditetapkan dalam kes *Rookes v. Barnard (No 1)* [1964] 1 AC 1129 yang telah diterima oleh mahkamah-mahkamah Malaysia. Dalam kes tersebut, Lord Devlin telah menggariskan kategori-kategori tersebut seperti berikut:
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> (a) the first category is oppressive, arbitrary or unconstitutional action by the servants of the government;
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> (b) second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and
>
> (c) expressly authorised by statute.
>
> (Lihat juga kes *Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals* [2015] 2 CLJ 766 (MR)).
>
> [28] Walaupun sekiranya kategori-kategori di atas telah dipenuhi, terdapat beberapa kekangan lain yang menghadkan pengawardan ganti rugi teladan, antara lain ialah plaintif hendaklah merupakan mangsa perbuatan terkutuk tersebut. Lord Devlin dalam kes tersebut menyatakan di ms. 1227:
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> > [T]he plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour.
>
> [29] Dalam kes rayuan ini, mangsa ialah si mati dan bukannya plaintif kerana plaintif mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan dan sebagai bakal pentadbir sah harta pusaka si mati.
>
> [30] Kategori penting ialah defendan-defendan hendaklah didapati bertindak secara "oppressive, arbitrary or unconstitutional". Sama ada tindakan defendan-defendan termasuk dalam kategori tersebut adalah merupakan persoalan fakta yang perlu dilihat berdasarkan keseluruhan keterangan yang dikemukakan semasa perbicaraan. Dalam *McGregor on Damages*, edisi ke-16, dinyatakan di ms. 44:
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> > ... central requirement for exemplary damages has always been the presence of outrageous conduct, disclosing malice, fraud, cruelty and the like.

[31] Persoalan penting yang perlu diputuskan ialah sama ada perbuatan defendan-defendan termasuk dalam kategori-kategori yang dinyatakan oleh Lord Devlin dalam kes di atas. Dalam hubungan ini keterangan yang relevan ialah seperti berikut:

(i) SD1 telah membawa si mati dan Joseph turun ke bawah kerana pada pendapatnya, adalah berbahaya untuk meninggalkan mereka di aras dua dan SD1 telah menghalang banduan-banduan lain dari aras dua turun dengan mengunci pintu wing dua aras dua. SP3 dalam keterangannya pula menyatakan bahawa sekiranya pintu wing tidak berkunci, pasti banduan-banduan dari aras atas akan turun ke bawah. (ms. 208 rekod rayuan);

(ii) serangan ke atas si mati dan SP3 oleh banduan-banduan lain di aras bawah adalah di luar jangkaan munasabah SD1 kerana tiada sebarang tanda atau maklumat mengenainya sebelum ini;

(iii) tindakan segera telah diambil apabila pergaduhan berlaku di mana bantuan UKP telah diminta sebaik sahaja pergaduhan tersebut berlaku, iaitu pada jam lebih kurang 12 tengah hari;

(iv) SD3, SD6 dan SD8 telah mengambil tindakan segera sebaik sahaja mereka menerima laporan melalui walkie talkie pada jam lebih kurang 12 tengah hari;

(v) SD2 telah bergegas ke tempat kejadian sebaik sahaja mendengar bunyi bising di Blok Ehsan. Beliau juga menghantar kedua-dua banduan ke klinik penjara apabila banduan-banduan yang menyerang telah mulai bersurai; dan

(vi) SD8 telah memberi arahan kepada semua pihak yang terlibat untuk menghantar si mati dan banduan yang lain dengan segera ke Hospital Sungai Buloh bagi mendapatkan rawatan.

[32] Selepas menganalisis keterangan-keterangan di atas, kami berpendapat bahawa tindakan defendan-defendan tidak termasuk dalam apa jua cara pun dalam kategori yang mewajarkan ganti rugi teladan diawardkan. Oleh itu, ganti rugi teladan sebanyak RM100,000 yang diawardkan oleh hakim bicara bijaksana diketepikan.

[155] In the result, the Court of Appeal in *Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn. Ghaur Chandram Murugesu & Satu Lagi Rayuan* [2016] 3 CLJ 210 CA held that on the facts, the conduct of the defendants in that case did not fall within any of the recognised categories of conduct which may attract an award of exemplary damages. That is the factual part of the judgment. More importantly, the Court of Appeal also took the view that a claim for exemplary damages can only be made by the victim of the tort and that dependents and the estate are not the victims of the tort.

[156] Thus, I was left in the invidious position of having to choose between the two conflicting Court of Appeal decisions which are both binding upon this court. Ultimately, the view that I took is that the decision in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15 CA is to be preferred which means that if the facts support a claim

for exemplary damages, then there is no legal impediment in awarding exemplary damages. In making a choice as to which of the two decisions to follow, I was acutely mindful of the need for observance of the doctrine of *stare decisis*. In this regard, I sought refuge in the guidance given by the Federal Court in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1 (FC) where it was said as follows:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.
>
> The said exceptions are as decided in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718. The part of the decision in *Young v. Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 *vide* its Section 3.
>
> To recap, the relevant ratio decidenci in *Young v. Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given *per incuriam* need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v. Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v. Bristol Aeroplane*.

[157] I will now give reasons for preferring *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal (supra)* which held that exemplary damages may be allowed where public misfeasance and violation of constitutional rights have been established. They are as follows. First, the decision by the Court of Appeal in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15 CA was handed down on 8 August 2014 whereas *Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn. Ghaur Chandram Murugesu & Satu Lagi Rayuan* [2016] 3 CLJ 210 CA was delivered on 2 February 2016.

[158] However, it is baffling that the case of *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal (supra)* which was decided earlier and reported in the law report about two years prior to the decision of the Court of Appeal in the later case, was not mentioned in the latter judgment which was delivered on 2 February 2016.

[159] Thus, if the Court of Appeal in the later case did not have the benefit of the judgment in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal (supra)* then it would appear that the later decision by the Court of Appeal may have been decided *per incuriam*.

[160] This is all the more because the earlier Court of Appeal decision had carefully considered and applied the approach that was taken by the House of Lords in *Ashley v. Chief Constable of Sussex Police* [2008] 2 WLR 975 HL which had approved of the award of "vindicatory damages" for death caused by serious misbehaviour by the police despite the presence of s. 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 which is similar to s. 8(2) of the Civil Law Act 1956 which prohibits a claim for exemplary damages (see paras. 69-72 of the judgment).

[161] But at the same time, I also observed that the following pre-existing Malaysian cases which touched on the prohibition by s. 8(2) of the Civil Law Act 1956, to an award of exemplary damages appears not to have been brought to the attention of the Court of Appeal in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra Nallathamby & Another (supra)*. For convenience, I shall reproduce the following passages from the judgment in *Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn. Ghaur Chandram Murugesu & Satu Lagi Rayuan (supra)* where these cases are mentioned.

> Ganti rugi Teladan
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> [24] Kami bersetuju dengan hujah Peguam Kanan Persekutuan terpelajar bahawa hakim bicara yang bijaksana telah terkhilaf apabila membenarkan ganti rugi teladan kepada plaintif. Adalah menjadi undang-undang mantap bahawa orang tanggungan yang membawa tuntutan di bawah Akta Undang-Undang Sivil 1956 adalah tidak berhak untuk mendapatkan ganti rugi teladan.
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> [25] Terdapat banyak nas yang menyokong proposisi undang-undang di atas. Dalam kes *Mariayee Veeran & Anor v. Mohammad Nasir Mohamed Ali & Anor* [1985] 1 CLJ 416; [1985] CLJ (Rep) 224; [1985] 1 MLJ 427, Mahkamah Persekutuan memutuskan:
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> > Lastly, it was submitted by learned counsel for the plaintiffs that the learned trial judge erred in law in holding that the plaintiffs were not entitled to exemplary damages in all the circumstances and the pleadings herein. No authority binding on this court had been cited in support of such a proposition. In our judgment, this contention was entirely without merit and appears to be contrary to the law. Section 8(2)(a) of the Civil Law Act 1956 enacts that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include any exemplary damages. There is no reason, in our opinion, why this provision should not be extended to cover a claim made for and on behalf of the dependents of the deceased. This ground also failed.

A [26] Kes di atas telah dirujuk dan diikuti dalam kes *Muhammad bin Hashim (bapa Noor Azlan bin Muhamad (Simati) Bertindak Bagi Pihak Tanggungan) v. Teow Teik Chai & Anor* [1996] 1 CLJ 615, apabila Mahkamah Tinggi memutuskan:

> B … a claim by the persons qualified under s. 7(2) for "loss of support" is nothing more than a claim for financial loss; exemplary damages cannot be obtained in a claim made for and on behalf of the dependents of a deceased (see *Mariayee v. Mohamed-Nasir* [1985] 1 MLJ 427).

C [27] Ganti rugi teladan adalah bertujuan untuk menghukum defendan-defendan dan mencegah mereka dari mengulangi perbuatan terkutuk tersebut dan juga untuk mencegah orang lain dari melakukan perbuatan yang sama. Ganti rugi teladan hanya boleh diawardkan jika ia telah memenuhi kategori-kategori yang ditetapkan dalam kes *Rookes v. Barnard (No 1)* [1964] 1 AC 1129 yang telah diterima oleh mahkamah-mahkamah Malaysia. Dalam kes tersebut, Lord Devlin telah menggariskan kategori-
D kategori tersebut seperti berikut:

(a) the first category is oppressive, arbitrary or unconstitutional action by the servants of the government;

(b) second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well
E exceed the compensation payable to the plaintiff; and

(c) expressly authorised by statute.

(Lihat juga kes *Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals* [2015] 2 CLJ 766 (MR)).

F [28] Walaupun sekiranya kategori-kategori di atas telah dipenuhi, terdapat beberapa kekangan lain yang menghadkan pengawardan ganti rugi teladan, antara lain ialah plaintif hendaklah merupakan mangsa perbuatan terkutuk tersebut. Lord Devlin dalam kes tersebut menyatakan di ms. 1227:

> G [T]he plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour.

[29] Dalam kes rayuan ini, mangsa ialah si mati dan bukannya plaintif kerana plaintif mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan dan sebagai bakal pentadbir sah harta pusaka si mati.

H **[162]** As such, in spite of the fact that all relevant authorities may not have been placed before the Court of Appeal in both the cases as aforementioned, I am more inclined to accept the jurisprudence that was established in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra Nallathamby & Another (supra)*, which permits an award of exemplary damages against a public authority where public misfeasance and violation of constitutional rights have been
I established. I have since discovered that the Court of Appeal in *Nurasmira Maulat Abd Jaffar & Ors v. Ketua Polis Negara & Ors* [2015] 2 CLJ 231; [2015] 3 MLJ 105 CA also allowed a claim by the estate of a deceased person for exemplary damages for violation of the deceased's constitutional rights. In

that case, the deceased died as a result of a wrongful shooting by the police. This fortifies my view that exemplary damages may be allowed in spite of s. 8(2) of the Civil Law Act 1956. No doubt, this issue will or may eventually be decisively settled by the Federal Court.

[163] For now, I take the view that based on the current state of the law, exemplary damages are permissible where public misfeasance and violation of constitutional rights have been established. It may be recalled that the death of the deceased in this case was reported to SUHAKAM. That in itself indicates that there is a rule of law, human rights and constitutional dimension to this unfortunate episode.

[164] In *Datuk Seri Khalid Abu Bakar & Ors v. N Indra Nallathamby & Another (supra)* a sum of RM300,000 was awarded as exemplary damages. In that case, the deceased was beaten to death by the police officers. It would be wrong to draw direct parallels with that case because here it has not been proven that the injuries on the deceased were inflicted by the police.

[165] In all probability, they were self-inflicted as the deceased was apparently jumping all over the place, hitting his head and hurling his body against the iron bars of the cell. Be that as it may, the overall conduct of the police here is nothing short of appalling.

[166] They did nothing to attend to the medical needs of the deceased, despite the express instruction of the Magistrate who directed that the suspects be given medical attention if the situation warranted it. Of course, the Magistrate should have been more robust and could have been more assertive in his directive or instructions to the police. But the ultimate responsibility was with DW3. He prevaricated and said that he was aware that the deceased turned from normal to mentally abnormal and yet, he did not deem it necessary to send the deceased to the hospital.

[167] DW3 conveniently took refuge in his assertion that it is normal for detainees to pretend to be abnormal. In fact, before the coroner, DW3 said that he thought that the deceased was "main-main" and so he did not think it was necessary to send him to the hospital.

[168] Insofar as the lock-up personnel are concerned, it is lamentable that the officers in charge of the lock-up did not come forward to explain what took place from the time the remand was over around mid-day on Sunday, 9 September 2012 until the death of the deceased on 10 September 2012 around 7.48am.

[169] Of course, D4 died even before the coroner's inquest was conducted. But surely there would be others in charge of the lock-up at IPD Dang Wangi who would have been able to shed light on so many issues pertaining to the lock-up and the CCTV.

[170] It is amazing that DW4 as the senior police officer who investigated the death of the deceased could not even tell who was the police officer who appeared at the entrance of cell "I" on 10 September 2012 at 7.48am (see images at pp. 230-242 B3). When asked during cross-examination, DW4 said he did not know who was the officer who appeared in the image at p. 242 B3.

[171] Next, DW2 was also not able to tell who was on patrol duty on the floor where cell "I" was located. No doubt D4, as the officer in charge of the lock-up had died before the coroner's inquest, but he was present when the deceased's body was discovered on 10 September 2012.

[172] I find that there is just no evidence that DW4 had thoroughly investigated all the circumstances pertaining to the death of the deceased. He said that he could not complete his investigations because on 16 August 2013 (almost a year later) he was transferred to IPD Seberang Perai Utara Pulau Pinang and the case was taken over by ASP Khairil Azuad B Abd Azis ("ASP Khairil").

[173] Unfortunately, ASP Khairil did not testify during the trial. In any case, I do not understand why DW4 could not complete his investigation into the death of the deceased as his transfer order only came out in August 2013 when the death of the deceased occurred on 10 September 2012. It just does not make any sense. From his witness statement (DW4A), it does not appear that he interviewed D4 or DW3 or any of the police officers who did the patrolling on the relevant dates. It also does not appear that DW4 had apprised himself of the contents of DW3's ID or the remand papers and in particular the Magistrate's instructions on 9 September 2012. Finally, there was no evidence from any senior police officer from IPD Dang Wangi in relation to the operations of the lock-up. Here, although D4 had died even before the coroner's inquest, no effort was made to call another officer who was in charge of the lock-up and who was cognisant of all the facts to explain all the gaps and crevices in the factual matrix, including but not limited to the identity of the patrollers on duty on 9 September 2012 (3pm to 11pm) and from 11pm on 9 September 2012 to 7am on 10 September 2012, which would have been the critical period of detention.

[174] However, the witnesses for the defendants all feigned ignorance of the persons who were on patrol duty and further no one from the CCTV control room was called to explain why no action was taken particularly when the images all showed that the deceased was in pain in the early hours of the morning on 10 September 2012. Taking all of the above conduct of the police into consideration, it is my view that there was a lackadaisical and indifferent attitude by the defendants especially DW3 ("D3"), DW2 ("D1") and DW4, whose investigation into the death of the deceased was perfunctory, to say the least. It is clear that DW4 did not even satisfy himself that the Lock-up Rules 1953 had been complied with. This is quite clearly a case which is replete with instances which are indicative of a violation of the deceased's

constitutional right not to be deprived of his life, in circumstances where the defendants as the police authority, had deprived him of his liberty and thus assumed a heavy and onerous burden and had a special and extraordinary duty to ensure that during the time when the deceased was in their custody, he was given proper medical attention.

[175] The death of the deceased in these circumstances is both regrettable and lamentable. By all accounts, it was an avoidable death. It is just that neither DW3 nor the police personnel at IPD Dang Wangi bothered to take the necessary steps to send the deceased to hospital. If this is not behaviour which is reprehensible and unconstitutional, then I do not know what is.

[176] In the result, I am impelled to the view that the factual matrix of this episode clearly establishes conduct on the part of the police which warrants an award of exemplary damages. The question now is whether the quantum should be at par with what was awarded in the case of *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal (supra)*. In that case, a sum of RM300,000 was awarded. Insofar as this case is concerned, it was established during the trial that no action was taken against any police officers arising out of the death of the deceased. In all the circumstances, I am of the view that a sum of RM200,000 would be fair and reasonable as exemplary damages.

The Order

[177] Special damages - RM3,500 with interest at 5% per annum from 12 September 2012 until the date of full payment or realisation.

Bereavement - RM10,000 with interest at 5% per annum from 8 September 2015 until the date of full payment or realisation.

Loss of dependency - RM144,000 with interest at 5% per annum from 8 September 2015 until the date of full payment or realisation.

Exemplary damages - RM200,000 with interest at 5% per annum from 8 September 2015 until the date of full payment or realisation.

Costs: The defendants are to pay costs in the sum of RM50,000. Further, as per O. 59 r. 24 of the Rules of Court 2012, there shall be interest on the costs awarded at 5% per annum from 9 January 2017 until the date of full payment or realisation. Pursuant to O. 91 r. 1(b) Rules of Court 2012, I hereby order that there be no allocator for the costs that were awarded against the defendants.

Order accordingly.